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In The
Supreme Court of The United States

October Term, 1959

No. 7

LEON WOLFE, GEORGE SIMKINS, JR., JOSEPH STURDIVENT, SAMUEL MURRAY, and ELIJAH H. HERRING,

Appellants,

vs.

STATE OF NORTH CAROLINA

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF IN BEHALF OF THE STATE OF NORTH CAROLINA, APPELLEE

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BRIEF IN BEHALF OF THE STATE OF NORTH CAROLINA, APPELLEE.

OPINION BELOW

The Opinion of the Supreme Court of North Carolina from which this appeal was filed is reported as STATE v. COOKE, et al, 248 N. C. 485, 103 S. E. 2d 846. This Opinion appears in the Transcript of Record filed in this Court on October 22, 1958, beginning on p. 107. This Opinion was filed by the Supreme Court of North Carolina on June 4, 1958, and the Judgment of the Supreme Court of North Carolina making the Opinion effective was also filed on the same date (R-118). The Judgment and Opinion affirmed the Judgment of the Superior Court of Guilford County entered on February 10, 1958 (R-26). This Court postponed further consideration of the question of jurisdiction until the hearing of the case on the merits (R-140).

This case was before the Supreme Court of North Carolina on a former trial, and the Supreme Court of North Carolina arrested judgment in favor of the Appellants because of defects in the warrant upon which the Appellants were tried. The opinion on this trial was filed June 28, 1957, and the case is reported as STATE v. COOKE, et al, 246 N. C. 518, 98 S. E. 2d 885. This Opinion is also set forth in the Statement as to Jurisdiction filed by the Appellants on p. 55, which Statement as to Jurisdiction is designated as being October Term, 1958, No. 466.

JURISDICTION

The Appellants invoked the jurisdiction of the Court under 28 USC 1257(2). Appellants further contend that if they are mistaken in their contention as to their right to come to this Court by direct appeal from the judgment of the Supreme Court of North Carolina, then the Appellants say that the appeal papers should be treated as a Petition for Certiorari under 28 USC 2103.

The Appellee, State of North Carolina, contends that on the Record in this case no substantial Federal question has been presented, that no Federal question was timely or properly raised by the Appellants before the Trial Court and that no Federal question was expressly passed upon by the Supreme Court of North Carolina. The contentions of Appellee, State of North Carolina, on the question of jurisdiction are set forth in its Motion to Dismiss, filed at the October Term, 1958, No 466, in this case. The Appellee, State of North Carolina, again renews its Motion to Dismiss this case for the reasons set forth in said Motion. It is believed by the Appellee that the Transcript of Record in this case will show that the Supreme Court of North Carolina decided this case strictly on an interpretation of a State statute, and the Record will further show that it was conceded by the Appellee at all times that the Appellants could not be excluded from the golf course in question because of their race or color.

STATE STATUTE

The Appellee, State of North Carolina, does not concede

that any substantial Federal question has been properly raised by the Appellants as to the validity of the State statute (Sec. 14-134, General Statutes of North Carolina) under which the Appellants were indicted and convicted. We believe this Court will agree when it examines the full Record and Transcript, as well as the Opinion of the Supreme Court of North Carolina, that the State Court did not pass upon any such constitutional question. However, the Appellants having been indicted and convicted under this statute, we quote it below:

> "If any person, after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor and on conviction shall be fined not exceeding $50.00 or imprisoned not more than 30 days."

The statute is designed to protect possession regardless of whether the possession is actual or constructive (STATE v. BAKER, 231 N. C, 136, 56 S. E. 2d 424). Regardless of any question of the constitutional validity of the above quoted statute on its face, it is the contention of the Appellee that the Appellants have not properly raised any Federal question as to the application of the statute to them.

CONSTITUTIONAL PROVISIONS

The Appellee, State of North Carolina, does not concede that any Federal question has been decided by the Supreme Court of North Carolina nor that any Federal question involving the Constitution of the United States has been properly raised by the Appellants. Since, however, the Appellee will be required to answer arguments based upon the second paragraph of Article VI of the Constitution of the United States and Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, we quote these provisions below, as follows:

"Article VI, Second Paragraph

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all

Treaties made, or which shall be made; under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary nothwithstanding."

"Fourteenth Amendment, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

The Appellee, State of North Carolina, submits the following as the questions presented upon this appeal:

1. Should the appendixes of Appellants' Brief be disregarded and stricken by this Court because of irrelevant and immaterial matter which was never introduced in evidence, was never a part of the record, and was never presented to the trial court or the Supreme Court of North Carolina?

2. Did the Supreme Court of North Carolina pass upon and determine any Federal question that would confer jurisdiction upon this Court?

3. Is the defense of former jeopardy available to the Appellants on the Record in this case?

4. Does the Rule of Collateral Estoppel apply to the facts as disclosed by the Record in this case?

5. Does the Supremacy Clause of the United States Constitution have any application in favor of the Appellants upon the Record in this case?

6. Is there any evidence that the Appellants have been deprived of any rights or privileges guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States?

7. Does the doctrine of judicial notice relieve the Appellants from introducing into evidence the record of the case tried in the Federal District Court?

STATEMENT OF THE CASE

There have been two trials in this case both of which have been passed upon by the Supreme Court of North Carolina. The Appellee gives a narrative, or summary, of the events connected with this case, as follows:

1. The Appellants are five colored citizens residing in Greensboro, North Carolina. The Appellants were originally indicted upon warrants issued from the Greensboro Municipal-County Court upon charges of violating Sec. 14-134 of the General Statutes of North Carolina (see p. 3 of this Brief where this Statute is quoted).

2. These warrants charged Appellants with a criminal trespass upon the property of "Gillespie Park Golf Course". The Appellants were found guilty in the Municipal-County Court on February 6, 1956, and appealed to the Superior Court of Guilford County which is a Court of general jurisdiction.

3. In the Superior Court the cases were consolidated for trial, and after the State had introduced its evidence it was allowed to amend the warrants so as to charge the trespass as having been committed on the property of "Gillespie Park Golf Club, Inc." instead of "Gillespie Park Golf Course" as formerly charged. The jury, in the Superior Court returned a verdict of Guilty and Appellants appealed to the Supreme Court of North Carolina.

4. The Supreme Court of North Carolina decided (STATE v. COOKE, et als, 246 N. C. 518, 98 S. E. 2d 885) that the trial

court erred in allowing the State to amend the warrant as set out above and such amendment was a fatal variance, and judgment against the Appellants was arrested. The Opinion of the Supreme Court in the above trial was filed on June 28, 1957.

5. The first trial started on December 3, 1956, and while this first case was pending in the Supreme Court of North Carolina the Appellants instituted an action in the United States District Court for the Middle District of North Carolina against the City of Greensboro, the Greensboro City Board of Education and the Gillespie Park Golf Club, Inc. (SIMKINS v. CITY OF GREENSBORO, 149 F. Supp. 562). The Opinion of the District Judge in this case was filed on March 20, 1957, and the case was affirmed by the Circuit Court of Appeals for the Fourth Circuit on June 28, 1957, which is the same date that the Supreme Court of North Carolina filed its Opinion on the first appeal (CITY OF GREENSBORO v. SIMKINS, 246 F. 2d 425).

6. If this Court will refer to the two Opinions filed by both the District Court of Appeals and the Circuit Court of Appeals, it will see that there is no recital of evidence or findings of fact in these two Opinions. The substance of these two Opinions is that plaintiffs cannot be denied equal privileges to the use of the golf course on account of race and color, and that the parties defendant would be subjected to a decree restraining them from discriminating against the plaintiffs on account of race or color. We will discuss the racial aspects of the case later on but here it is sufficient to say that the Appellee, State of North Carolina, has never denied the right of colored citizens to play on this golf course, provided they become eligible as members on the same basis as white citizens. The Appellee, State of North Carolina, was not a party to the cases in the Federal Courts and was not served with a restraining order.

7. On the 2nd of December, 1957, the Appellants were again indicted on new warrants issued from the Greensboro Municipal-County Court again charging a violation of Sec. 14-134 of the General Statutes of North Carolina, relating to

Criminal Trespass, and heretofore quoted in this Brief (see R-2-23 for warrants). The Appellants had previously been indicted on bills of indictment found by the Grand Jury of the Superior Court of Guilford County (R-36) but the prosecuting officer, upon motion, caused a nol-pros with leave to be entered in these cases and tried the Appellants upon the warrants because the Greensboro Municipal-County Court had original and exclusive jurisdiction of this offense. This procedure is in accordance with State practice.

8. The Appellants moved to quash the warrants in the Municipal-County Court. These motions being overruled, they entered pleas of Not Guilty, and upon being convicted the Appellants appealed to the Superior Court of Guilford County where the cases were consolidated for trial and were heard at the February 3, 1958 Criminal Term of the Superior Court of Guilford County. The Appellants renewed their Motions to Quash (R-32) and these Motions were overruled by the Court. The Appellants were found Guilty by the jury and again appealed to the Supreme Court of North Carolina which found no error in the trial below in its Opinion filed June 4, 1958 (STATE v. COOKE, et al., 248 N. C. 483, 103 S. E. 2d 846). This Opinion also appears at R-107, and it is from this Opinion and the decree entered thereon which is the subject of this appeal (Judgment of Supreme Court appears at R-118).

9. If the Court will examine the Motion to Quash (R-32) it will see that the Appellants do not attack directly the constitutionality of Sec. 14-134 of the General Statutes but Appellants complain of the administration of the statute in view of the decision in the Federal Court and because of the Supremacy Clause of the United States Constitution. The Appellants further invoked the doctrine of Collateral Estoppel and alleged that under the circumstances of this case they were placed in jeopardy contrary to the Constitution of the United States. Further on we will show the Court that they have now raised for the first time in their Brief filed in this Court alleged constitutional objections which were not raised before the trial court or the Supreme Court of North Carolina.

10. If this Court will read the evidence which begins on R-43 and extends through R-78, it is believed that the Court will arrive at the conclusion that the Appellants were not excluded from the golf course because of race or color but were simply excluded because they were not members of the Golf Club in any capacity and for which reason any person would be excluded regardless of race or color.

SUMMARY OF ARGUMENT

The Appellee, State of North Carolina, summarizes its argument as follows:

(a) The Appellants' Brief contains certain burdensome, irrelevant and immaterial matter which Appellee contends is contrary to Rule 40(5) of the Rules of this Court. For the most part this matter appears in the appendixes of Appellants' Brief (pp. 80-96). As examples, on pp. 80, 81, 82 of Appellants' Brief appear excerpts from the Brief of the City of Greensboro filed in the case in the Federal Court. Beginning on p. 83 there also appears a newspaper editorial and various newspaper articles relating to this same Golf Course. On p. 89 appears certain minutes of the Greensboro City Council and on p. 90 there appears a part of the Manual of Rules and Regulations of the Works Progress Administration. In the Brief there appears on pp. 6, 7, 13 and other places, quotations of the Findings of Fact made in the case in the Federal District Court.

This material was never introduced in evidence before the trial court and was never before the Supreme Court of North Carolina. This material does not appear in the Transcript of Record filed in this Court and does not appear in the original or State Record. We believe that this Court desires to judge the State and its Supreme Court fairly and that this Court will not make the State and its Supreme Court responsible for materials which were never before the State Supreme Court and never considered by it. The Appellee will incorporate in this Brief a Motion to the effect that this matter be disregarded by the Court and that it be stricken from the Brief of Appellants.

(b) The Appellee will argue that the Supreme Court of North Carolina did not decide any Federal question, at least of a substantial nature, which would confer jurisdiction upon this Court. As we understand the matter, the question of jurisdiction is still open for consideration, having been reserved until final disposition of this case. We refer the Court to our Motion to Dismiss, filed in this cause at the October Term, 1958, No. 466, and bearing the same title as this appeal.

First, it is the contention of Appellee that the evidence in this Record shows that no racial discrimination was involved in excluding the Appellants from the golf course. The evidence beginning on R-72 shows the Bylaws of the Club and the requirements of membership. The evidence beginning on R-46 shows the Manager's concepts of eligible members. The Supreme Court of North Carolina, as well as the Trial Judge, were well aware that constitutionally the Appellants could not be excluded from the use of the golf course because of race or color (HOLMES v. CITY OF ATLANTA, 350 U. S. 879, 76 S. Ct. 141, 100 L. ed. 876). Color alone does not dispense with eligibility conditions (FRASIER v. BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, 134 F. Supp. 589—3-Judge District Court).

The Appellants did not properly introduce into evidence findings of fact and the judgment in the case of SIMKINS v. CITY OF GREENSBORO, 149 F. Supp. 562, and even if they had introduced the judgment in evidence it would not have resulted in any estoppel or collateral estoppel which would have prevented the State from exercising its sovereign power of criminal prosecution. It is believed that the cases on collateral estoppel, where it is applicable, are decisions of the courts of one sovereignty and that no cases can be produced showing the application of the doctrine as originating in one sovereignty and being applied in another sovereignty. This being true there is no room for application of the Supremacy Clause of the Federal Constitution. When it is applicable the Supreme Court of North Carolina recognizes the Supremacy Clause (CONSTANTIAN v. ANSON COUNTY, 244 N. C. 221, 93 S. E. 2d 163). Appellants were required to present any

constitutional question in the State courts according to State practice, and the procedure of North Carolina is liberal in the presentation of such questions (JOHN v. PAULLIN, 231 U. S. 583, 585, 58 L. ed. 381, 383). We furthermore call the Court's attention to the fact that Appellants do not attack the validity of the statute but attempt to attack the authority exercised under it and that the mere objection to the exercise of authority under a statute whose validity is not attacked cannot be made the basis of an appeal (WILSON v. COOKE, 327 U. S. 474, 90 L. ed. 793).

It is the contention of Appellee that there is no substantial question as to former jeopardy because of a variance in the bill of indictment or warrant, the arresting of judgment and trial upon a proper warrant (HILL v. TEXAS, 316 U. S. 400, 86 L. ed. 1559, 1563). This is in accord with the holdings of the Supreme Court of North Carolina (STATE v. HICKS, 233 N. C. 511, 64 S. E. 2d 871, cert. den. 342 U. S. 381, 96 L. ed. 629). There is, therefore, no substantial question as to former jeopardy. Constitutional rights must be seasonably raised in accordance with the requirements of State Law (EDDLEMAN v. CALIFORNIA, 344 U. S. 357, 97 L. ed. 387).

The Appellants' complaint as to multiple criminal proceedings that cause fundamental unfairness or which unduly harass an accused was not raised in the trial court nor was such question raised before the Supreme Court of North Carolina. The Appellants' complaint of a lack of standards in the eligibility requirements for playing on the golf course was not presented to the trial court and was never presented to the Supreme Court of North Carolina. The appellants' complaint as to the Rules of Evidence of the State of North Carolina, which, it says, close the mouths of key witnesses, was never presented to the trial court and was never passed upon by the Supreme Court of North Carolina. The Appellants' complaint that the Supreme Court of North Carolina for the first time held that the Criminal Trespass statute should be applied to public lands is not correct because the statute is directed towards a violation of possession, but even if the Supreme Court of North Carolina held that if applied

to the lands possessed in this case no constitutional question would be raised because Appellants have no vested right in any present decision or prior decision of an appellate court. Objections to the competency or relevancy of evidence in a State court involve the action of the general or local law of evidence and furnish no ground to support a Federal question (BUCHALTER v. NEW YORK, 319 U. S. 427, 87 L. ed. 1492).

The above Summary of Argument all relates to the proposition that no substantial Federal question was passed upon by the trial court or by the Supreme Court of North Carolina and that the case was disposed of by the Supreme Court of North Carolina on adequate State grounds without any attempted evasion of any Federal question. It is true that in its Opinion the Supreme Court of North Carolina cited certain Federal cases in which it was held that golf club property could not be denied in its use to persons simply because they were Negroes (DAWSON v. MAYOR AND CITY COUNCIL OF BALTIMORE CITY, 220 F. 2d 386; LAWRENCE v. HANCOCK, 76 F. Supp. 1004; TATE v. DEPARTMENT OF CONSERVATION & DEVELOPMENT, 133 F. Supp. 53) and that this case did not question the soundness of the legal principles set forth in the Federal cases. This is not to be understood as deciding any Federal question because this Court "reviews judgments, not statements in opinions." (BLACK v. CUTTER LABORATORIES, 351 U. S. 292, 100 L. ed. 1188, 76 S. Ct. 824) Furthermore, it is the Appellee's contention that the Appellants could easily have raised all the constitutional questions desired on motions of judgment as of nonsuit (STATE v. McGEE, 237 N. C. 633, 75 S. E. 2d 783) had they simply stated the grounds of their constitutional attack which would have been recorded by the court reporter and Appellants would not even have had to file a motion in writing. Instead of this, Appellants chose to present their questions by means of a motion to quash and by motion in arrest of judgment, which, under local State practice, applies only to defects appearing on the face of the record (STATE v. COCHRAN, 230 N. C. 523, 53 S. E. 2d 663; STATE v. GASTON, 236 N. C. 499, 73 S. E. 2d 311).

(c) From a substantive standpoint the defense of former jeopardy is not presented according to State practice since it cannot be considered on a motion in arrest of judgment or a motion to quash but must be a special plea (STATE v. MORGAN, 95 N. C. 641; STATE v. DAVIS, 223 N. C. 54, 25 S. E. 2d 164). Former jeopardy, or the right not to be placed twice in jeopardy for the same offense, is not a guarantee protected by the Fourteenth Amendment (STATE v. HICKS, 233 N. C. 511, 64 S. E. 2d 871, cert den. 342 U. S. 381, 96 L. ed. 629) and the Fifth Amendment in this respect is not incorporated in the Fourteenth Amendment. This Court is in accord with the ruling that the quashing of a bill of indictment for a variance does not prevent trial later on on a good or valid bill of indictment (STROUD v. UNITED STATES, 251 U. S. 15, 64 L. ed. 103).

(d) As to whether or not defendants shall be given the benefit of estoppel or collateral estoppel alleged to have been created or arising on issues or judgment in another case, this Court has said that this is not a constitutionally protected requirement (HOAG v. NEW JERSEY, 356 U. S. 464, 2 L. ed. 2d 913, 78 S. Ct. 829). The fact that the State of North Carolina recognizes the doctrine of collateral estoppel does not mean that it applies in a criminal case in the State Court as to questions adjudicated in a civil action in a Federal court and as we have shown, the Appellants must have introduced evidence, even if such plea is available, showing the identity of the questions determined, and this the Appellants did not do. Under local State practice any objection to records offered in evidence which is sustained must contain the records as a part of the exceptions sent to the Supreme Court of North Carolina so that Court may pass upon the question. The record does show (R-79) that the trial court excluded Exhibits Nos. 6 and 7 but Exhibits Nos. 6 and 7 were never sent to the Supreme Court of North Carolina as a part of the case on appeal or in any other proper manner so that that Court could know and pass upon same. It should be noted that the Appellants themselves made up their own case on appeal, which was agreed to by the prosecuting officer (R-106).

(e) In view of the fact that it was conceded by all parties that the Appellants could not be excluded from the golf course because of race or color and the trial court also stated this to the jury in its instructions, and, further, in view of the fact that the case was tried strictly on the question of a criminal trespass by invading the possession of the incorporated golf club (STATE v. BAKER, 231 N. C. 136, 56 S. E. 2d 424) there was no Federal point involved which brought into focus the Supremacy Clause of the United States Constitution. This is especially true since the Federal record was never introduced in evidence, and the Supreme Court of North Carolina never had the Federal record before it for consideration.

(f) The Appellants have not been deprived of any rights or privileges guaranteed by Sec. 1 of the Fourteenth Amendment. The question of multiple prosecutions was not passed upon by the State courts, and the validity of the regulations and qualifications for membership in the golf club were not passed upon by the State courts nor was the question as to whether the Trespass Statute of the State did or did not apply to public lands. Since this Court is reviewing on appeal the action of a State court this Court will only consider questions passed upon below (WHITNEY v. CALIFORNIA, 274 U. S. 357, 47 S. Ct. 641, 71 L. ed. 1095).

(g) Appellee will argue that the doctrine of Judicial Notice does not come to the aid of the Appellants in this case. The Supreme Court of North Carolina cited many cases in its Opinion showing that where two courts are involved in actions which may involve the same questions or issues neither court would be bound to take notice of the judgment in the other court judicially (SCHULER v. ISRAEL, 120 U. S. 506, 30 L. ed. 707). The Appellee will cite other cases in its substantive argument showing that the Supreme Court of North Carolina was correct in its position that it could not take judicial notice of the evidence, findings of fact and judgment of the Federal District Court for the purposes of creating an estoppel or a collateral estoppel in favor of the Appellants in the State Court.

ARGUMENT

1

THE SUPREME COURT OF NORTH CAROLINA DECIDED THIS CASE ON AN INDEPENDENT, ADEQUATE AND TENABLE NONFEDERAL GROUND, AND THERE IS NO FEDERAL QUESTION FOR THE REVIEW OF THIS COURT.

A

The Appellants did not properly present a Federal question before the trial court or before the Supreme Court of North Carolina according to rules of State practice.

We think that the efforts of Appellants to raise a Federal question based upon alleged violations of rights protected by the Federal Constitution, and especially those guaranteed by the Fourteenth Amendment, must be tested according to the validity of the Motion to Quash (R-32) and the Motion to set aside the verdict, arrest judgment and grant the Defendants a new trial (R-91).

An analysis of the Appellants' Motion to Quash shows that Appellants contend that the Criminal Trespass Statute, 14-134 of the General Statutes, was unconstitutionally applied to them for the following reasons:

(1) The statute in its application to Appellants violated the Supremacy Clause of the United States Constitution in that it made a crime out of acts which the Federal District Court and the United States Court of Appeals for the Fourth Circuit held to be protected by the Fourteenth Amendment. The Appellants in Paragraph 1 of the Motion to Quash give a narrative of the case decided in the Federal District Court, state that they have subpoenaed the Clerk of the United States District Court for the Middle District to bring the full record and judgment roll and that they will offer it in evidence. When this is done Appellants say that this should estop the State from proceeding with the prosecution and

that if this is not done the judgment in the Federal Court will be nullified contrary to the Supremacy Clause. The Court will note that this whole argument is built upon the reception in evidence of the trial court of the record and judgment roll of the Federal Court.

(2) The Appellants say that they cannot be tried on the warrants issued and served upon them because bills of indictment were returned by the Grand Jury charging the same identical crime and that this procedure is not in conformity with the Opinion of the Supreme Court of North Carolina issued in the first trial.

(3) The Appellants say that to require them to stand trial on the warrants would be to place them in double jeopardy in violation of the Fifth Amendment to the Constitution as incorporated in the Fourteenth Amendment.

(4) The Appellants say that there is a fatal variance in the warrants because one of the defendants was designated as "George Simkins", whereas the person sought to be charged is "George Simkins, Jr."

When we consider the Motion to Set Aside the Verdict, Arrest Judgment and Grant a New Trial, we find that the Appellants assigned the following grounds:

(1) They incorporate in the Motion the same grounds set forth in the original Motion to Quash.

(2) Appellants allege that the Supremacy Clause of the Federal Constitution requires the Court to take notice of and enforce the judgment rendered by the Federal District Court and further allege that punishing the Apellants criminally on the same set of facts as that considered in the Federal District Court would nullify the Federal decree and injunction.

(3) Appellants quote from the Opinion of the Federal District Judge and then ask the Court to take judicial notice of matters of common knowledge which the Federal District

Judge referred to in his Opinion, and Appellants then allege that to permit the verdict to stand would violate the rights of the Appellants protected by the Fourteenth Amendment.

(4) Appellants quote from the Findings of Fact and say that they are made a part of the decree and thereby a part of the record and judgment roll and that the State Court must give effect to it and especially to Finding of Fact No. 33, which is quoted. Appellants quote again from another Finding of Fact and say that the State Court should set aside the verdict because it is in conflict with the quoted portion of the Opinion of the District Judge.

(5) Appellants say that the land on which the golf course is situated is not private property, and, therefore, that the Trespass Statute does not apply, and to support this Appellants quote Finding of Fact No. 30 of the Federal District Judge in the civil action. In addition, Appellants suggest that they being taxpayers of Greensboro they had a license to go upon said lands and that this removed them from the application of the Trespass Statute.

(6) Appellants contend that the trial court erroneously instructed the jury as to the bylaws of the golf club in that they do not regulate eligibility of members but regulate only the use of the golf course and that the trial court, therefore, gave the jury the impression that the Trespass Statute made it a misdemeanor to violate the rules and regulations governing the use of public land.

It is clear that Appellants have misconceived the function and use of the motions which they have attempted to use in order to raise the questions which they sought to present. North Carolina is a very liberal State in its procedure for raising constitutional questions in criminal cases. A motion to quash and a motion in arrest of judgment may both be used where the alleged constitutional defects appear on the face of the record. This is explained by the Supreme Court of North Carolina in the case of STATE v. COCHRAN, 230 N. C. 523, 53 S. E. 2d 663, where in discussing the functions of these motions, the Supreme Court of North Carolina said:

"The only exceptions and assignments of error in the record are directed to the alleged error of the court in (1) overruling the motion to quash, (2) overruling the motion in arrest of judgment, and (3) pronouncing judgment on the verdict.

"A motion to quash lies only for a defect on the face of the warrant or indictment. *S. v. Turner*, 170 N. C. 701, 86 S. E. 1019. The defect must appear on the face of the record. *S. v. Choate*, 228 N. C. 491, 46 S. E. 2d 476; *S. v. Davenport*, 227 N. C. 475, 42 S. E. 2d 686; *S. v. Callett*, 211 N. C. 563, 191 S. E. 27.

"It must appear from an inspection of the record that no crime is charged, *S. v. Morgan*, 226 N. C. 414, 38 S. E. 2d 166; *S. v. Gardner*, 219 N. C. 331, 13 S. E. 2d 529, or that the warrant or indictment is otherwise so defective that it will not support a judgment. *S. v. Francis*, 157 N. C. 612, 72 S. E. 1041; *S. v. Taylor*, 172 N. C. 892, 90 S. E. 294; *S. v. Gregory*, 223 N. C. 415, 27 S. E. 2d 140.

"The court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established evidence *aliunde* the record, the motion must be denied. *S. v. Brewer*, 180, N. C. 716, 104 S. E. 655.

"A motion in arrest of judgment, though somewhat broader in scope, serves the same purpose as a motion to quash. The motion to quash is directed to patent defects in the pleading while the motion in arrest of judgment is directed to such defect in the pleading, verdict, or other part of the record.

"To afford ground for a motion in arrest of judgment, it must appear that the court is without jurisdiction or that the record is in some respect fatally defective and insufficient to support a judgment. *S. v. Walker*, 87 N. C. 541; *S. v. Phillips*, 228 N. C. 446, 45 S. E. 2d 535; *S. v. Vandellip*, 225 N. C. 610, 35 S. E. 2d 885; *S. v. Chapman*, 221 N. C. 157, 19 S. E. 2d 250; *S. v. Foster*, 228 N. C. 72, 44 S. E. 2d 447; *S. v. Gregory, supra; S. v. Morgan, supra*, and cases cited; *S. v. Lewis*, 194 N. C. 620, 140 S. E. 434; *S. v. Turner, supra; S. v. McKeon*, 223 N. C. 404, 26 S. E. 2d 914.

"Here too, in considering the motion, the Court is con-

> fined to the record and may not consider extraneous facts or circumstances; and 'record', as here used, means the record proper. It does not include the case on appeal. *S. v. Efird*, 186 N. C. 482, 119 S. E. 881.
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> "The facts found by the court below were found on the preliminary hearing on the motion to quash. As it is not permissible to consider them on the motion to quash or on the motion in arrest of judgment, and the evide in respect thereto was not offered on the trial, they c stitute mere surplusage and have no proper place in the record. *S. v. Efird, supra.*"

A motion to quash in North Carolina may be used to raise the question of duplicity in the criminal pleading for this appearance on the face of the record (STATE v. WILLIAMSON, 250 N. C. 204, 108 S. E. 2d 443). A motion to quash can be made where the record shows that the court does not have jurisdiction (STATE v. WILKES, 233 N. C. 645, 65 S. E. 2d 129); where a State statute is directly attacked upon the basis that the statute itself is unconstitutional this can be done by a motion to quash (STATE v. FELTON, 239 N. C. 575, 80 S. E. 2d 625; STATE v. FURMAGE, 250 N. C. 616, ——S. E. 2d ——). A direct attack on a State statute for constitutional reasons may be made by a demurrer to the warrant (STATE v. GLIDDEN CO., 228 N. C. 664, 46 S. E. 2d 860). Examples of the use of motion in arrest of judgment for making various constitutional attacks where the defects appear on the face of the record are shown in the cases of STATE v. DOUGHTIE, 238 N. C. 228, 77 S. E. 2d 642; STATE v. GASTON, 236 N. C. 499, 73 S. E. 2d 311. In the case of STATE v. GASTON, the Supreme Court of North Carolina discusses a motion in arrest of judgment and explicitly holds that defects which appear only by the aid of evidence cannot be the subject of such a motion. It said:

> "A motion in arrest of judgment can be based only on matters which appear on the face of the record proper, or on matters which should, but do not, appear on the face of the record proper. *S. v. Sawyer*, 233 N. C. 76, 62 S. E. 2d 515; *S. v. Mitchem*, 188 N. C., 608, 125 S. E. 190; *S. v. Shemwell*, 180 N. C. 718, 104 S. E. 885. The record proper in any action includes only those essential proceedings which are made of record by the law itself, and

as such are self-preserving. *Thornton v. Brady*, 100 N. C. 38, 5 S. E. 910; *State ex rel. May Department Stores v. Haid*, 327 Mo. 567, 38 S. W. 2d 44; 23 C. J. S., Criminal Law, section 1515. The evidence in a case is no part of the record proper. *S. v. Matthews*, 142 N. C. 621, 55 S. E. 342. In consequence, defects which appear only by the aid of evidence cannot be the subject of a motion in arrest of judgment. *S. v. Sawyer, supra; S. v. Robertson*, 210 N. C. 266, 186 S. E. 247; *S. v. McKnight*, 196 N. C. 259, 145 S. E. 281; 23 C. J. S., Criminal Law, section 1526."

The only exception to the rules stated above, as supported by local State decisions, is that an objection to an indictment based on race discrimination in the organization of the Grand Jury may be raised by a motion to quash in which evidence can be used to support the motion but this is by virtue of statute and is, therefore, an exception (MILLER v. STATE, 237 N. C. 29, 74 S. E. 2d 513; STATE v. SPELLER, 229 N. C. 67, 47 S. E. 2d 537; STATE v. PERRY, 248 N. C. 334, 103 S. E. 2d 404). A part of Sec. 9-26 of the General Statutes reads as follows: "All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and empaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived." The Court will find another illustration of the function of a motion in arrest of judgment in the case of STATE v. BANKS, 247 N. C. 745, 102 S. E. 2d 245.

The simplest and easiest manner in which to raise constitutional questions which do not appear on the face of the record and for the support of which evidence must be introduced outside of the record is shown by the case of STATE v. McGEE, 237 N. C. 633, 75 S. E. 2d 783 where it will be seen that all that counsel is required to do is to dictate the grounds of the constitutional attack when motion is made for judgment as of nonsuit, which grounds are taken down by the court reporter, and when the motion is made at the conclusion of the State's evidence the defendant, or appellant, may introduce evidence to support his grounds of constitutional attack and may renew his motion at the close of all the evidence. It is submitted that any constitutional ques-

tion may be raised under this type of motion with specific grounds stated or dictated to the court reporter and that the motion does not even have to be in writing.

We have gone into all these phases of local State practice in order to show that when the Supreme Court of North Carolina said in the opinion in this case that under a motion to quash "the court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established by evidence *aliunde* the record, the motion must be denied", the Supreme Court of North Carolina was not inventing any new rules to be followed against these Appellants but was following well-established, criminal procedure of the State.

As to the defense of estoppel, or more properly collateral estoppel, which the Appellants attempt to raise in the Motion to Quash, it should first be stated that we are unable to find any holding or ruling of this Court to the effect that collateral estoppel is a constitutional requirement. On the other hand, this Court has expressed grave doubts (HOAG v. NEW JERSEY, 356 U. S. 464, 2 L. ed. 2d 913, 78 S. Ct. 829) as to whether there is any constitutional question in such a defense even when properly set up in the trial court and passed upon by the highest court of the State. In the Hoag case, this Court said:

> "Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held."

We have discussed the State procedure in some detail in order to show that this defense was never properly raised according to local State practice. If the Court will refer to R-71 (State Record, p. 69) it will be seen that the Appellants called as a witness the Deputy Clerk of the Federal Court in Greensboro and that she had the original papers, or record, in the Federal case and that she was never examined nor were any of the records introduced in evidence. If the Court will refer to R-79 (State Record, p. 77) the Court will see

that one of the attorneys for the Appellants stated that she would like to have a ruling on "whether or not these would be admissible." The Court stated: "I am going to sustain the objection as to those two exhibits, that is No. 6 and No. 7." We do not know what "these" means. We do not know what Exhibits Nos. 6 and 7 contain. They were never made a part of the Record as an offer of evidence and they were never submitted to the Supreme Court of North Carolina. North Carolina is like a large number of States in that there must be an offer of proof made a part of the Record and brought up for review before the highest appellate court of the State can consider the correctness of a trial court's ruling.

In order to show this Court that this rule has been followed in cases where race questions have not been involved we desire to cite a few cases. In the case of IN RE SMITH'S WILL, 163 N. C. 465, 466, 467; 79 S. E. 977, the Supreme Court carefully explained its rule on such a question, saying:

> "Caveators offered a certain record in a proceeding, said to have involved the sanity of the testator; but the same reason for its exclusion applies as in the case of the objections above noted. We are not informed as to its contents, so that we can see its relevancy and give an intelligent opinion as to the validity of the exception now made to the ruling. We may add these authorities to those already cited upon the general question that the party asking the question, which is excluded, must disclose to the court what he expects to prove by the witness. *Overman v. Coble*, 35 N.-C. 1; *S. v. Pierce*, 91 N. C. 606; *Boney v. R. R.*, 155 N. C. 95; *Whitmire v. Heath*, 155 N. C. 304. The same rule prevails in other jurisdictions. *In re Pinney's Will*, 27 Minn., 280. We said in *Whitmire's case*: 'A court cannot pass intelligently upon evidence unless it knows what it is, in order that its bearing upon the issue may be determined. The defendant should have stated what he expected to prove, otherwise the question was properly excluded, not because it is incompetent, but because it cannot be seen that it is. The Court must judge of its competency and materiality —not the counsel. This is the well settled practice and the rule of reason.' *It also applies to papers and records offered in evidence, as will appear by reference to S. v. Pierce, supra, and Fulwood v. Fulwood, 161 N. C. 601.*" (Emphasis ours)

There are many other cases which sustain this same proposition (PROFFITT v. INSURANCE C., 176 N. C. 680, 682, 97 S. E. 635; WALKER v. COOPER, 159 N. C. 536, 539, 75 S. E. 727; STATE v. CHOATE, 238 N. C. 491, 496, 46 S. E. 2d 476; STATE v. KNIGHT, 247 N. C. 754, 760, 102 S. E. 2d 259). The Supreme Court of North Carolina has followed this rule certainly as far back as 1836 when in the case of BROOKS v. ROSS, 19 N. C. 485, the Court held that it could not consider a deed where there was no statement in the record as to the terms of the deed and the deed had not been offered in evidence or sent up with the record as an offer of proof. The Supreme Court of North Carolina has also held to the same rule where exceptions were made to the charge of the court and the charge was not sent up (STATE v. SIMONDS, 154 N. C. 197, 69 S. E. 790). The Supreme Court of North Carolina is like other courts in that it holds that it is bound by the record before it and cannot pass on questions which are not raised below and shown in the record (STATE v. HAM, 238 N. C. 94, 76 S. E. 2d 346).

As to the State practice on a motion for a new trial and to set aside the verdict, these are matters that are entirely within the discretion of the trial court, and under North Carolina practice a refusal to grant such motion is not reviewable on appeal (STATE v. McKINNON, 223 N. C. 160, 25 S. E. 2d 606; STATE v. CHAPMAN, 221 N. C. 157, 19 S. E. 2d 250; STATE v. WAGSTAFF, 219 N. C. 15, 12 S. E. 2d 657; STATE v. BROWN, 218 N. C. 415, 11 S. E. 2d 321).

We have gone into all these questions of State practice in order to show the Court that the Appellants did not properly raise their constitutional questions and that there was nothing before the Supreme Court of North Carolina requiring it to pass on any Federal constitutional question.

The rights, privileges, or immunities claimed must be set up in the State Court and denied by its decision.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;

HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722;

KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U. S. 626, 44 L. ed. 299;

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U. S. 291, 47 L. ed. 480;

PARKER v. McLAIN, 237 U. S. 469, 59 L. ed. 1051;

THOMAS v. IOWA, 209 U. S. 258, 52 L. ed. 782;

NEW YORK EX REL. COHN v. GRAVES, 300 U. S. 308, 81 L. ed. 666.

In PARKER v. McLAIN, 237 U. S. 469, 59 L. ed. 1051, on p. 471, it is stated:

> "Our jurisdiction to review the judgment of the highest court of a state turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision."

A claim of jurisdiction in the Supreme Court of the United States to review a decision of a state court cannot be sustained by reference to briefs and statements which are not a part of the record.

ZADIG v. BALDWIN, 166 U. S. 485, 41 L. ed. 1087;

MEDBERRY v. OHIO, 24 How. 413, 16 L. ed. 739;

LYNCH v. NEW YORK, 293 U. S. 52, 79 L. ed. 191.

Of course, a state must furnish fair and reasonable procedure to raise Federal constitutional questions but when the state does furnish such procedure the appellants must use this procedure. This is made clear in the case of EDELMAN v. CALIFORNIA, 344 U. S. 357, 97 L. ed 387, 73 S. Ct. 293, where this Court said:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. HULBERT v. CHICAGO, 202 U. S. 275, 50 L. ed. 1026, 26 S. Ct. 617

(1906); MUTUAL LIFE INS. CO. v. McGREW, 188 U. S. 291, 308, 47 L. ed. 480, 484, 23 S. Ct. 375, 63 LRA 33 (1903). Noncompliance with such local law can thus be an adequate state ground for a decision below."

Even if it can be said that the Appellants raised a Federal question in the trial court, such question must be pursued on appeal to the State's highest court in the manner required by local State practice.

Under these circumstances we think the statement of the Court in the case of JOHN v. PAULLIN, 231 U. S. 583, 585, 58 L. ed. 381, 383, is appropriate. This Court there said:

"Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

See also:

C. I. O. v. McADORY, 325 U. S. 472, 477, 89 L. ed. 1741;

PARKER v. ILLINOIS, 333 U. S. 571, 92 L. ed. 886;

CENTRAL UNION TEL. CO. v. EDWARDSVILLE, 269 U. S. 190, 70 L. ed. 229;

C. & O. R. CO. v. McDONALD, 214 U. S. 191, 53 L. ed. 963;

HARDING v. ILLINOIS, 196 U. S. 78, 49 L. ed. 394.

In TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572, it was held that where the State practice required a plea in abatement instead of a motion to quash that this Court would follow the State practice.

In BAILEY v. ANDERSON, 326 U. S. 203, 207-7, 90 L. ed. 3 this Court said:

"Inspection of the record does not show that, in denying

the writ of error, the state court passed upon any constitutional question not raised or passed upon in the course of the proceedings below. Such appears not to be its practice. Rule 22 of the Rules of the Supreme Court of Appeals, 181 Va lxxv; cf. Ward Lumber Co. v. Henderson-White Mfg. Co. 107 Va 626, 628, 629, 59 S. E. 476, 17 LRA (NS) 324; Bliss v. Spencer, 125 Va. 36, 50, 99 S. E. 593, 5 ALR 619; Reynolds v. Adams, 125 Va. 295, 314, 99 S. E. 695. On this record we cannot say that the interest claimed was not included in the award, or, if it was not, that the Supreme Court of Appeals of Virginia, by denying writ of error, passed upon any question of the constitutionality of such denial of interest, not raised on the record or passed upon below. Unless this affirmatively appears upon the record brought here for review on appeal, this court is without jurisdiction of the appeal. Jacobi v. Alabama, 187 U. S. 133, 135, 136, 47 L. ed. 106-108, 23 S. Ct. 48; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 309, 47 L. ed. 480, 485, 23 S. Ct. 375, 63 LRA 33; Chicago, I & L. R. Co. v. McGuire, 196 U. S. 128, 131, 49 L. ed. 413, 415, 25 S. Ct. 200. See Flournoy v. Wiener, 321 U. S. 253, 262, 263, 88 L. ed. 708, 714, 715, 64 S. Ct. 548, and cases cited."

In WILLIAMS v. GEORGIA, 349 U. S. 375, 99 L. ed. 1161, this Court said:

"A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power."

See, also, the following cases:

LAYTON v. MISSOURI, 187 U. S. 356, 47 L. ed. 214;

MORRISON v. WATSON, 154 U. S. 111, 38 L. ed. 927;

BALDWIN v. KANSAS, 129 U. S. 52, 32 L. ed. 640;

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;

SPIES v. ILLINOIS, 123 U. S. 131, 31 L. ed. 80.

B

If the issue of former jeopardy was properly raised it does not involve a Federal question.

The contention that the Fifth Amendment is incorporated in the Fourteenth Amendment, and, therefore, Appellants are constitutionally protected from alleged double jeopardy or former jeopardy is, of course, erroneous (BARTKUS v. ILLINOIS, ——— U. S. ———, 3 L. ed. 2nd 684, 79 S. Ct. ———; BROCK v. NORTH CAROLINA, 344 U. S. 424, 97 L. ed. 456, 73 S. Ct. 349; PALKO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288, 58 S. Ct. 149). In North Carolina it is the established authority that no former jeopardy attaches where there is a fatal variance in the bill of indictment (STATE v. HICKS, 233 N. C. 511, 516, 64 S. E. 2d 871; cert. den. 96 L. ed. 629, 342 U. S. 381; STATE v. MILLER, 231 N. C. 419, 57 S. E. 2d 392; STATE v. DRAKEFORD, 162 N. C. 667, 78 S. E. 108; STATE v. SHERRILL, 82 N. C. 694). There is, therefore, no Federal question on this point. Likewise the Supremacy Clause would have no application because no circumstances were presented or passed upon by the Supreme Court of North Carolina which warranted the application of the Clause, and there is no Federal question on this issue.

C

The questions attempted to be raised by the Appellants under the Fourteenth Amendment were not passed upon by the State courts.

The Appellants attempt to raise, for the first time in this Court, certain questions which were not determined by the State court. It is said that there was a lack of standards in the rules and regulations which established membership and entitled persons to play on the golf course. A reference to the Record in this Court, pp. 44, 45, 46, 48, 72, 73, 77, will show what was required for membership and will further show that no condition of race or color prohibited membership. Furthermore, this was not presented to the trial court nor was it passed upon by the Supreme Court of North Carolina.

It is further said that the State Rules of Evidence close the mouths of certain key witnesses, and here again this was not presented to or passed upon by the Supreme Court of North Carolina.

It is further said by Appellants that the Supreme Court of North Carolina held for the first time that this Criminal Trespass Statute applied to public lands. This was a question for the State court to decide; furthermore, the Golf Club Corporation held a lease or an estate for years and had invested about $100,000 in the development of the property. The Criminal Trespass Statute is directed towards a violation of possession and it is not denied that the Golf Club Corporation was in possession of the property. Under the Criminal Trespass Statute a tenant in possession exercises lawful control over land, and the Supreme Court of North Carolina has held that a tenant has such possession which entitles him to invite persons upon the property, and these invited persons are not guilty of willful trespass even though the landlord forbids such persons to enter upon the land (STATE v. LAWSON, 101 N. C. 717, 7 S. E. 905). This was a question of local State law and the decision of the Supreme Court of North Carolina is decisive on the point. Even if the Supreme Court of North Carolina had held for the first time in this case that the Criminal Trespass Statute did apply to public lands this would not create a Federal question because the Appellants have no vested right in prior decisions of the Court (TIDAL OIL CO. v. FLANAGAN, 263 U. S. 444, 450, 451, 44 S. Ct. 197, 198, 68 L. ed. 382; CAROLINA-VIRGINIA RACING ASS'N. v. CAHOON, 214 F. 2d 830, 832).

It is also said that the Appellants were convicted of a crime which they could not with reasonable certainty know that they were committing. If this means that the Appellants are now attacking Sec. 14-134 of the General Statutes for the reason that it does not constitutionally describe a crime with any ascertainable standard, then this question was not raised below or presented to either the trial court or the Supreme Court of North Carolina.

It is also said that because the first warrants were quashed and Appellants were tried again on valid warrants that this results in fundmental unfairness or unduly harassing an accused. As we have already pointed out, it is no viola-

tion of the Federal Constitution to try a person a second time because the warrant or bill of indictment is defective, and, therefore, such a prosecution does not fall within the doctrine of Multiple Criminal Proceedings. The *Hoag Case*, (HOAG v. NEW JERSEY, 356 U. S. 464, 2 L. ed 2nd 912, 78 S. Ct. 829) arose out of facts in which a defendant was alleged to have robbed five individuals on a single occasion and who was acquitted in a State court on three indictments of robbery of three individuals but was subsequently prosecuted and convicted for the robbery of the fourth individual, and this Court affirmed the conviction of the defendant for the robbery of the fourth individual.

It is submitted, therefore, that all of these things must be raised in the courts below before this Court will give them consideration for this Court will only consider questions that have been adjudicated below. In WHITNEY v. CALIFORNIA, 274 U. S. 357, 47 S. Ct. 641, 71 L. ed. 1095, Mr. Justice Brandeis explained the reviewing power of this Court in his concurring opinion, as follows:

> "Our power of review in this case is limited not only to the question whether a right guaranteed by the Federal Constitution was denied (Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Montana ex rel. Haire v. Rice, 204 U. S. 291, 301, 51 L. ed. 490, 495, 27 Sup. Ct. Rep. 281), but to the particular claims duly made below, and denied (Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 485-488, 56 L. ed. 1171, 1175, 1176, 32 Sup. Ct. Rep. 790). We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases with errors, although the objection was not taken in the trial court. Wiborg v. United States, 163 U. S. 632, 658-660, 41 L. ed. 289, 298, 299, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U. S. 207, 221, 222, 49 L. ed. 726, 731, 732, 25 Sup. Ct. Rep. 429. This a a writ of error to a state court. Because we may not inquire into the errors now alleged, I concur in affirming the judgment of the state court."

In YAKUS v. UNITED STATES, 321 U. S. 414, 88 L. ed. 835, 64 S. Ct. 660, in speaking of the timely assertion of alleged constitutional rights, this Court said:

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil v. Vermont, 144 U. S. 323, 331, 36 L. ed. 450, 455, 12 S. Ct. 693; Barbour v. Georgia, 249 U. S. 454, 460, 63 L. ed. 704, 707, 39 S. Ct. 316; Whitney v. California, 274 U. S. 357, 360, 362, 380, 71 L. ed. 1095, 1099, 1100, 1107, 47 S. Ct. 641. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 77 L. ed. 180, 53 S. Ct. 32, 86 ALR 174. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in Whitney v. California supra (274 U. S. 380, 71 L. ed. 1107, 47 S. Ct. 641), and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare Woolsey v. Best, 299 U. S. 1, 81 L. ed. 3, 57 S. Ct. 2, with Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717."

As to the competency or relevancy of evidence in State courts and the so-called closing of the mouths of witnesses by sustaining objections, it is submitted that objections to the competency or relevancy of evidence in a State court involve the application either of the general or local law of evidence and furnish no ground for review or interposition by this Court.

BUCHALTER v. NEW YORK, 319 U. S. 427, 87 L. ed. 1492;

ADAMSON v. CALIFORNIA, 332 U. S. 46, 67 S. Ct. Rep. 1672, 1679;

LIZENBA v. CALIFORNIA, 314 U. S. 219, 227, 86 L. ed. 166;

BARRINGTON v. MISSOURI, 205 U. S. 483, 51 L. ed. 890;

SHERMAN v. GRINNELL, 144 U. S. 198, 36 L. ed. 403;

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454.

Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. JOHN v. PAULLIN, 231 U. S. 583, 585. See also C. I. O. v. McADORY, 325 U. S. 472, 477; PARKER v. ILLINOIS, 333 U. S. 571; CENTRAL UNION TEL. CO. v. EDWARDSVILLE, 269 U. S. 190; CHESAPEAKE & OHIO R. CO. v. McDONALD, 214 U. S. 191; HARDING v. ILLINOIS, 196 U. S. 78.

We will not burden this brief with further discussion of this question but we do refer the Court to certain cases which sustain our position that the State Court must be given an opporunity to pass upon constitutional questions before this Court will charge it with any errors in regard to such matters.

See:

UNITED STATES v. SPECTOR, 343 U. S. 169, 72 S. Ct. 591, 96 L. ed. 863;

SPIES v. ILLINOIS, 123 U. S. 143, 8 S. Ct. 21, 31 L. ed. 80;

BROOKS v. MISSOURI, 124 U. S. 394, 8 S. Ct. 443, 31 L. ed. 454;

BALDWIN v. KANSAS, 129 U. S. 52, 9 S. Ct. 193, 32 L. ed. 640;

MORRISON v. WATSON, 154 U. S. 111, 14 S. Ct. 995, 38 L. ed. 927;

ERIE R. CO. v. PURDIE, 185 U. S. 148, 22 S. Ct. 605, 46 L. ed. 847;

LAYTON v. MISSOURI, 187 U. S. 356, 23 S. Ct. 137, 47 L. ed. 214;

LOUISVILLE & N. R. CO. v. WOODFORD, 234 U. S. 46, 34 S. Ct. 739, 58 L. ed. 1202;

WILSON v. COOK, 327 U. S. 474, 66 S. Ct. 663, 90 L. ed. 793;

WILLIAMS v. GEORGIA, 349 U. S. 375, 99 L. ed. 1161, 75 S. Ct. 814;

PARKER v. ILLINOIS, 333 U. S. 571, 92 L. ed. 886, 68 S. Ct. 708;

PENNSYLVANIA R. CO. v. ILLINOIS BRICK CO., 297 U. S. 447, 462, 463, 80 L. ed. 769, 56 S. Ct. 556;

BAILEY v. ANDERSON, 326 U. S. 203, 90 L. ed. 3, 66 S. Ct. 66.

D

Conclusion on question of Federal jurisdiction.

In concluding our argument on the question of Federal jurisdiction, we wish to point out that the Appellants contend that because they recited certain portions of the Opinion and the Findings of Fact entered in the Declaratory Judgment case in the Federal District Court, and further, because the Prosecutor for the State did not file any written denial of the Motion that these allegations must be considered as admitted as to the facts alleged therein. To support this the Appellants cite Sec. 1-159 of the General Statutes of North Carolina (BONHAM v. CRAIG, 80 N. C. 224, 227, and TOMKINS v. MISSOURI, 323 U. S. 485, 89 L. ed. 407, 65 S. Ct. 370).

The simple answer to these contentions is that Sec. 1-159 of the General Statutes pertains to pleadings in civil actions; the section is as follows:

"Sec. 1-159. *Allegations not denied, deeemed true.* — Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply is, for the purposes of the

> action, taken as true. But the allegation of new matters in the answer, not relating to a counterclaim, or of new matter in the reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case requires."

The case of BONHAM v. CRAIG, supra, simply holds that where an allegation in the complaint is not denied in the answer it is admitted and has the same effect as if found by the jury. This form of admission by default is a common and ordinary principle of law in force in nearly all jurisdictions. It does not apply to motions made during the progress of the trial in a criminal case. Of course, these motions can be put in writing if the movant desires to do so but it is not required and Appellants cannot cite this Court a single North Carolina statute dealing with criminal procedure that requires such motions to be in writing. The usual practice in criminal cases is for the motion and the grounds relied upon to support the same to be dictated to the court reporter where they are made a part of the case on appeal when written up by the reporter. These motions are addressed to the court for a ruling and relate to matters appearing on the face of the record, and, of course, the prosecutor may urge in oral argument any reason he deems proper against such motions.

The general rule in such matters is well stated in 60 C. J. S. (Motions) p. 12, Sec. 10:

> "In the absence of a statute or rules of court requiring it, a motion need not be reduced to writing, but may be made orally in open court; and a rule requiring motions to be made in writing and filed does not apply to motions of course made in the progress of the cause or to motions made in open court during the trial or disposition of a case called for trial."

It is elementary that a motion is not a pleading and especially is this true as to motions made during the progress of a trial and this proposition, of course, requires no citation of authority to support it.

The case of TOMKINS v. MISSOURI, supra, cannot aid the

Appellants. In this case this Court was considering the sufficency of the allegations of a petition for a writ of habeas corpus and of necessity this petition was a pleading. For the purpose of determining the adequacy of the petition this court said that the allegations would be deemed to be true and were sufficient to establish a *prima facie* case for the issuance of the writ. This is the same principle that obtains in North Carolina and is the equivalent of the rule that a demurrer to a pleading admits all the facts which are well pleaded and alleged. It does not apply to motions in criminal cases.

The Appellants cannot raise a Federal question for the first time in their jurisdictional statement (HIAWASSEE RIVER POWER CO. v. CAROLINA-TENNESSEE POWER CO., 252 U. S. 341, 344, 64 L. ed. 601, 40 S. Ct. 330; THOMAS v. IOWA, 209 U. S. 258, 52 L. ed. 782).

Aside from the question of noncompliance with local State practice, it is clear that the decision of the Supreme Court of North Carolina based upon the nonFederal ground is broad enough to sustain the State Court judgment and that this nonFederal ground is adequate and tenable (EUSTIS v. BOLLES, 150 U. S. 361, 370, 37 L. ed. 1011; BEREA COLLEGE v. KENTUCKY, 211 U. S. 53, 53 L. ed. 81; FOX FILM CORP. v. MULLER, 296 U. S. 207, 210, 80 L. ed. 158; HERB v. PITCAIRN, 324 U. S. 117, 125-126, 89 L. ed. 789). The prosecution in this case having been grounded entirely on the theory that the criminal trespass was an invasion of possession and the State having admitted all the way through that the Appellants could not be excluded from the golf course because of race or color, the trial court having instructed the jury to this effect, and the Supreme Court of North Carolina having recognized the nondiscriminatory rule established by the Federal courts, there was no question of racial discrimination involved, and the disposition of the question was solely on State grounds. The whole record, as well as the Opinion of the Supreme Court of North Carolina, shows that there was no evasion of the Federal question attempted to be raised and that no device was adopted to merely prevent a review of the decision upon a Federal question.

This record does not show that a rule of State procedure had been used unreasonably to avoid a decision relative to Federal rights, but, to the contrary, the citations in this brief on State practice show that the Supreme Court of North Carolina has followed rules of State practice in force for many decades.

The Appellants, even if they had properly set up their alleged constitutional rights, have chosen to frame the argument upon the theory that their Federal rights prevent application of the State statute and that this amounts to a denial of Appellants' Federal rights rather than any validation of the State statute, and, therefore, an appeal does not lie in this case (MERGENTHALER LINOTYPE CO. v. DAVIS, 251 U. S. 256, 259, 64 L. ed. 255, 40 S. Ct. 133).

As stated in WILSON v. COOK, 327 U. S. 474, 90 L. ed. 793:

> "For 'the mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis' of an appeal."

We further submit that if the appeal of the Appellants is treated as an application for certiorari the same rule would apply and that the rights, privileges or immunities relied upon by the Appellants must be set up in the State courts (BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454; HARTFORD LIFE INSURANCE CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722; KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U. S. 626, 44 L. ed. 299; MUTUAL LIFE INSURANCE CO. OF NEW YORK v. McGREW, 188 U. S. 291, 47 L. ed. 480).

Sufficiency of the evidence to be presented to the jury presents no substantial Federal question (NOBLE v. MITCHELL 164, U. S. 367, 41 L. ed. 472; AMERICAN RY. EXPRESS CO. v. KENTUCKY, 273 U. S. 269, 71 L. ed. 639; BELL TEL. CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U. S. 30, 84 L. ed. 563).

Whether an indictment is sufficient under the Constitution

and Laws of the State is not a Federal question (BARRINGTON v. MISSOURI, 205 U. S. 483, 51 L. ed. 890; RE ROBERTSON, 156 U. S. 183, 39 L. ed. 389; BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454).

Whether or not a question is properly presented to a State court for decision should be determined by applying State laws and rules of court.

BUENA VISTA COUNTY v. IOWA FALLS, ETC., R. R. COMPANY, 112 U. S. 177, 28 L. ed. 680;

TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572;

DELMAR JOCKEY CLUB v. MISSOURI EX REL. ATTORNEY GENERAL, 210 U. S. 324, 52 L. ed. 1080;

MARIA MATHESON v. THE BRANCH BANK OF THE STATE OF ALABAMA, 7 Howard 258, 12 L. ed. 692;

JOHN v. PAULLIN, 231 U. S. 583, 58 L. ed. 381.

The rights, privileges, or immunities must be set up in the State Courts.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454;

HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722;

KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U. S. 626, 44 L. ed. 299;

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U. S. 291, 47 L. ed. 480.

II

APPELLANTS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY ANY ALLEGED MULTIPLE TRIALS NOR DOES ANY QUESTION OF FORMER JEOPARDY ARISE BECAUSE APPELLANTS WERE TWICE TRIED OR BECAUSE BILLS OF INDICTMENT

WERE PROCURED IN THE SUPERIOR COURT OF GENERAL JURISDICTION.

Appellants have complained so much about the fact that they have been tried twice on the State charge of Criminal Trespass that the Appellee will explain the actual facts relative to this point, and they are as follows:

(a) Appellants were first convicted upon warrants issued from the Greensboro Municipal-County Court, and these warrants charged the Appellants with trespassing upon the possession of the *Gillespie Park Golf Course*. In this first trial the State, upon motion of the prosecuting officer, amended the warrants so that they charged a trespass upon the premises of *Gillespie Park Golf Club, Inc.*.

(b) Upon conviction Appellants appealed to the Supreme Court of North Carolina, which held that the Court had no power to permit the amendment to be made to the warrant because it substituted one criminal charge for another or charged an entirely different crime from the one on which the defendants were convicted in the lower court (STATE v. COOKE, 246 N. C. 518, 521; 98 S. E. 2d 885). The judgment was arrested, as will be seen from the Opinion of the Supreme Court of North Carolina, and the Judge writing the Opinion on this appeal stated that the Appellants "may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment", and the same Justice also stated that the Appellants could be tried under the original warrant. The concurring opinion of Mr. Justice Parker stated:

> "It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments."

(c) The Court will bear in mind that this arrest of judgment in the first trial came about upon an appeal pursued by the Appellants. The prosecuting officer of the Guilford Superior Court procured bills of indictment, which appear at R-36 through 42. At that time the prosecutor was not

aware that under the provisions of Chapter 971 of the Session Laws of 1955 of North Carolina the Greensboro Municipal-County Court of Guilford County had original and exclusive jurisdiction over the offense charged in the warrants. Ordinarily this would not have made any difference because by statute the Superior Courts of the State, which are Courts of general jurisdiction, have concurrent jurisdiction of criminal offenses with these inferior courts. However, this was not true of Guilford County, since the statute on concurrent jurisdiction had excepted Guilford County. The statute, Sec. 7-64 of the General Statutes of North Carolina, reads as follows:

> "Sec. 7-64. *Concurrent Jurisdiction.*—In all cases in which by statute original jurisdiction of criminal actions has been, or may hereafter be, taken from the superior court and vested exclusively in courts of inferior jurisdiction, such exclusive jurisdiction is hereby divested, and jurisdiction of such actions shall be concurrent and exercised by the court first taking cognizance thereof. The provisions of this section shall remain in full force and effect, unless expressly repealed by some subsequent act of the General Assembly, and shall not be repealed by implication or by general repealing clauses in any act of the General Assembly conferring exclusive jurisdiction on inferior courts in misdemeanor cases which may be hereafter enacted. Appeal shall be, as heretofore, to the superior court from all judgments of such inferior courts: Provided, that this section shall not apply to the counties of Alleghany, Cabarrus, Caswell, Cherokee, Clay, Craven, Currituck, Dare, Davidson, Edgecombe, Gaston, Gates, Graham, Granville, *Guilford*, Harnett, Henderson, Hertford, Hyde, Iredell, Jones, Lenoir, New Hanover, Pamlico, Perquimans, Rockingham, Rutherford, Scotland, Surry, Union and Warren." (Emphasis ours)

(d) When the prosecutor realized this new warrants were issued in the Greensboro Municipal-County Court (R-2—25) and the Appellants were tried in that Court and upon conviction appealed to the Superior Court of Guilford County. The prosecutor in the Superior Court of Guilford County tried the Appellants on the warrants, which is according to State practice in such cases, and entered a nol-pros as to bills

of indictment. This indicated that the prosecutor did not wish to prosecute on the bills, and for that matter the bills of indictment were void. However, Appellants would be protected if any attempt was made to try them on the bills of indictment because jeopardy for identical offenses is prohibited by the State Constitution (STATE v. WATSON, 209 N. C. 229, 183 S. E. 286). Mr. Justice Rodman, who wrote the Opinion of the Supreme Court of North Carolina, explains all this when in the Opinion he wrote as follows:

> "In closing the opinion in the previous appeal, the writer, author of the opinion, said: 'Defendants may, of course, now be tried under the original warrant since the court was without authority to allow the amendment changing the crime charged; or they may be tried on bills found in the Superior Court for the crime attempted to be charged by the amendment.'
>
> "The last clause of that opinion is also relied on in the motion to quash. The statement, accurate as to most of the counties of the State, is inaccurate with respect to Guilford and the other counties enumerated in the proviso to G. S. 7-64. The Legislature, in the exercise of its discretion, has denied to the Superior Court sitting in the counties named in the proviso to G. S. 7-64 the right to exercise concurrent jurisdiction with inferior courts in the trial of misdemeanors. Because of the limitations so imposed on the jurisdiction of the Superior Court of Guilford County, it could not exercise original jurisdiction of the crime charged, namely, trespass after being forbidden, and if defendants were to be prosecuted for the trespass presently charged, the prosecution had to originate in a court inferior to the Superior Court. This is made clear in the concurring opinion of Justice Parker, who said: 'It seems plain that a verdict of conviction or acquittal on the warrants in this case as drawn would not be a bar to the new warrants in the form to which they were changed by the amendments.'"

The Appellants in their Motion to Quash (R-32, 35) allege that this constitutes "double jeopardy of their liberty in violation of the Fifth Amendment to the Constitution of the United States as incorporated into the Fourteenth Amendment to the Constitution *****". Appellants in their brief for the first time contend that this constitutes multiple or

successive trials for multiple offenses which is contrary to the Fourteenth Amendment because of fundamental unfairness or unduly harassing an accused. This contention was never presented to the trial court or the Supreme Court of North Carolina and represents "smuggling additional questions into a case" after this Court ordered the case heard (IRVINE v. CALIFORNIA, 347 U. S. 128, 129, 98 L. ed. 561, 74 S. Ct. 381). However, as we have shown on the question of jurisdiction, the quashing of a bill of indictment which is bad does not constitute any former jeopardy and by the same token it would not constitute harassment by multiple offenses as contended for by Appellants. This seems to be taken for granted by Mr. Justice Holmes in UNITED STATES v. OPPENHEIMER, 242 U. S. 85, 61 L. ed. 161, 37 S. Ct. 68, where he said, after holding that the bar of the Statute of Limitations could not be litigated on a second indictment:

> "Of course, the quashing of a bad indictment is no bar to a prosecution on a good one ****".

The case of HOAG v. NEW JERSEY, 356 U. S. 464, 2 L. ed. 2d 913, 78 S. Ct. 829, does not help the Appellants in the least. Hoag robbed five individuals on a single occasion and was acquitted in a State court prosecution on three indictments charging robbery of three of the individuals. Hoag was subsequently prosecuted and convicted on an indictment charging robbery of the fourth individual, and this conviction was upheld by this Court as not violating any provision of the Federal Constitution, and as not constituting former jeopardy prohibited by the Fifth Amendment or the Fourteenth Amendment. There is, of course, no denial of due process where one has appealed from a conviction of crime in a State court and has had the conviction set aside and has been retried for the same offense (MURPHY v. MASSACHUSETTS, 177 U. S. 155, 44 L. ed. 711, 20 S. Ct. 639; FRANK v. MANGUM, 237 U. S. 309, 59 L. ed. 969, 35 S. Ct. 582; LOUISIANA EX REL. FRANCIS v. RESWEBER, 329 U. S. 459, 91 L. ed. 422, 67 S. Ct. 374; HILL v. TEXAS, 316 U. S. 400, 86 L. ed. 1559, 62 S. Ct. 1159—compare PALCO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288,

58 S. Ct. 149; BROCK v. NORTH CAROLINA, 344 U. S. 424, 97 L. ed. 456, 73 S. Ct. 349).

The Constitution of the United States does not protect an individual against "double jeopardy" or successive prosecutions for the same offense in a State Court. The Fifth Amendment, which provides that no person shall for the same offense be twice put in jeopardy of life or limb, is a limitation upon action by the Federal Government and does not apply to action by States.

BARRON v. BALTIMORE, 7 Pet. 243;

UNITED STATES v. LANZA, 260 U. S. 377, 67 L. ed. 314;

BRANTLEY v. GEORGIA, 217 U. S. 284, 54 L. ed. 768;

PHILLIPS v. McCAULEY, 92 Fed. (2d) 790 (C. C. A. 9);

FOX v. OHIO, 5 How. 434, 12 L. ed. 410, 434.

This Record thus presents no question for decision under the Fifth Amendment.

The Fourteenth Amendment ("due process" and "privileges and immunities") does not guarantee to an individual the right not to be twice placed in jeopardy for the same offense.

Compare:

U. S. v. RAGEN, (1950; C. C. A. 7) 181 Fed. (2d) 1001;

AMRINE v. TINES, (1942; C. C. A. 10), 131 Fed. (2d) 827;

PALKO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288;

MAXWELL v. DOW, 176 U. S. 581, 44 L. ed. 597;

In U. S. v. RAGEN, supra, it is said, at p. 1003:

"The only right under the Federal Constitution of which the petitioner in the case at bar claims to be deprived is his right to be protected from double jeopardy. The sole specific reference in the United States Constitution to what is usually referred to as 'double jeopardy' is in the Fifth Amendment: '***.' But the Fifth Amendment is not directed to the States and applies only to offenses against, and trials under, the laws of the United States, Palko v. State of Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. ed. 288; Phillips v. McCauley, 9 Cir., 92 F. 2d 790.

****

"The Supreme Court has considered the question whether the right granted in the Fifth Amendment to be not twice placed in jeopardy for the same offense is within the scope of the due process clause of the Fourteenth Amendment. In Palko v. State of Connecticut, 302 U. S. 319, 323, 58 S. Ct. 149, 151, 82 L. ed. 288, the court stated: 'We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.'

"The court then held that the claimed double jeopardy there being considered was not a violation of the due process clause."

In AMRINE v. TINES, supra, it is said, at p. 833:

"And, unlike the fundamental right to assistance of counsel granted by the Sixth Amendment to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which it derived Federal power to correct state process."

Since the guarantee of due process afforded by the Fourteenth Amendment does not protect an individual against successive prosecutions for the same crime in a State Court,

the Appellants' plea of former jeopardy could only have raised questions concerning rights guaranteed him by the State Constitution. In affirming the conviction and sentence of imprisonment, the Supreme Court of North Carolina necessarily determined that the Appellant was not twice placed in jeopardy for the same offense in contravention of the North Carolina Constitution.

III

THE FEDERAL CONSTITUTION DOES NOT COMPEL THE STATE TO EXTEND TO THE APPELLANTS THE DOCTRINE OF ESTOPPEL OR COLLATERAL ESTOPPEL AND IRRESPECTIVE OF ANY CONSTITUTIONAL REQUIREMENTS THESE FORMS OF ESTOPPEL ARE NOT APPLICABLE IN THIS CASE.

The Appellee has pointed out in previous argument above that this Court has expressed grave doubts as to whether collateral estoppel can be regarded as a constitutional requirement (HOAG v. NEW JERSEY, supra). While the Appellants relied on this proposition in the court below referring to estoppel in their Motion to Quash, they did not emphasize the point in their brief before this Court, and it would seem that they prefer to pin their hopes on the principle of judicial notice. The doctrine of collateral estoppel is explained in the case of HOAG v. NEW JERSEY, supra, and citations of cases in which it has been applied and rejected, and in this connection this Court said:

> "Petitioner further contends that his conviction was constitutionally barred by 'collateral estoppel.' His position is that because the sole disputed issue in the earlier trial related to his identification as a participant in the Gay's Tavern robberies, the verdict of acquittal there must necessarily be taken as having resolved that issue in his favor. The doctrine of collateral estoppel, so the argument runs, is grounded in considerations of basic fairness to litigants, and thus for a State to decline to apply the rule in favor of a criminal defendant deprives him of due process. Accordingly, it is claimed that New Jersey could not relitigate the issue of petitioner's identity,' and is thus precluded from convicting him of robbing Yager.

"A common statement of the rule of collateral estoppel is that 'where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action.' Restatement, Judgments, Sec. 68(1). As an aspect of the broader doctrine of res judicata, collateral estoppel is designed to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation. See Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 820. Although the rule was originally developed in connection with civil litigation, it has been widely employed in criminal cases in both state and federal courts. See, e.g., Harris v. State, 193 Ga. 109, 17 S. E. 2d 573; Commonwealth v. Evans, 101 Mass. 25; United States v. Oppenheimer, 242 U. S. 85, 61 L. ed. 161, 37 S. Ct. 68, 3 ALR 516; Sealfon v. United States, 332 U. S. 575, 92 L. ed. 180, 68 S. Ct. 237; cf. Yates v. United States, 354 U. S. 298, 335, 1 L. ed. 2d 1356, 1384, 77 S. Ct. 1064.

"Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional rquirement. Certainly this Court has never so held. However, we need not decide that question, for in this case New Jersey both recognized the rule of collateral estoppel and considered its applicability to the facts of this case."

An examination of the cases in this Court will show that wherever it has been contended that the doctrine is applicable it has always been between the same parties, and the cases represent situations where both cases were tried in the Federal Courts and not situations where one case is tried in the Federal Court and the other tried in the State Court. In addition to the cases cited in HOAG v. NEW JERSEY, supra, the cases cited below represent some examples:

CROMWELL v. COUNTY OF SAC, 94 U. S. 51, 24 L. ed. 681;

SOU. PAC. R. R. CO. v. UNITED STATES, 168 U. S. 1, 48, 42 L. ed. 355;

BANKERS COAL CO. v. BURNET, 287 U. S. 308, 77 L. ed. 325;

TAIT v. WESTERN MD. RY. CO., 289 U. S. 620, 623, 77 L. ed. 1405.

There are also several cases in the various District Courts and Circuit Courts of Appeal, as follows:

THE EVERGREENS v. NUNAN, 141 F. 2d 927, 928;

ENGINEERS CLUB OF PHILADELPHIA v. UNITED STATES, 42 F. Supp. 182, 187;

UNITED STATES v. SILLIMAN, 167 F. 2d 607, 612;

BUROMIN CO. v. NATIONAL ALUMINATE CORP., 70 F. Supp. 214, 218;

UNITED STATES v. BOWER, 95 F. Supp. 19, 21;

HEDDEN v. UNITED STATES, 105 F. Supp. 1010, 1017;

CHARLES E. HARDING CO. v. HARDING, 88 A. L. R. 563, Annotation p. 574.

The Appellants are asking that the findings of fact and judgment of the Federal District Court in a civil action for declaratory judgment and injunction be accepted by the State Court as decisive of the prosecution and be made the equivalent of a verdict of Not Guilty. We do not believe this is proper and that the determinations in a civil action in the Federal Court can prevent the State from proceeding with a criminal prosecution. In the first place, the State was not a party to the civil action. The City of Greensboro, the Greensboro City Board of Education and the Gillespie Park Golf Club, Inc. were all created under the Constitution and Laws of the State of North Carolina with limited powers and duties, and these bodies or entities are not authorized to "stand in judgment for the State." (GUNTER v. ATLANTIC COAST LINE R. CO., 200 U. S. 285-287, 50 L. ed. 484, 485, 26 S. Ct. 252; FORD MOTOR CO. v. TREASURY DEPARTMENT OF INDIANA, 323 U. S. 459, 89 L. ed. 389, 65 S. Ct. 347). The prosecuting officer of the State in this case is a constitutional officer (Constitution of North Carolina,

Article IV, Sec. 23) and he was not made a party to the action. It is not believed that private parties or citizens can secure a judgment in the Federal Court which will prevent the State in the exercise of its constitutional powers and its police powers from prosecuting its criminal actions.

Certainly the reverse is not true in the application of estoppel for in the case of HELVERING v. MITCHELL, 303 U. S. 391, 82 L. ed. 917, 58 S. Ct. 630, Mr. Justice Brandeis thought that this could not be done, writing for this Court he said:

> "The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of res judicata. The acquittal was 'merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' Lewis v. Frick, 233 U. S. 291, 302, 58 L. ed. 967, 973, 34 S. Ct. 488. It did not determine that Mitchell had not wilfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled."

It would seem that an estoppel of any nature cannot flow from a criminal action to a civil action, then by the same token it cannot flow from the civil action to the criminal action.

The City of Greensboro is a municipal corporation with limited powers, and the Appellants have not shown, nor can they show, that the City of Greensboro is authorized to stand for the State in judgment in a civil action in the Federal Court. The same is true of the Greensboro City Board of Education, it being a governmental unit with limited powers for educational purposes, and it follows without argument that the incorporated Golf Club cannot perform this function.

The State of North Carolina cannot be sued except in cases where it gives consent for such action (DALTON v. STATE HIGHWAY COMMISSION, 223 N. C. 406, 27 S. E. 2d 1; CARPENTER v. ATLANTA, ETC. R. CO., 184 N. C.

400, 114 S. E. 693; DREDGING CO. v. STATE, 191 N. C. 243, 131 S. E. 665).

As pointed out, the burden of proof in the civil action is different from the burden of proof in the criminal action in the State Court. No authorized agency representing the State was made a party in the civil action, and, furthermore, the application of the doctrine, at least as shown by the cases examined, has been limited to cases decided by the courts of one sovereign. No cases have been found in which the doctrine had been applied in two cases arising and determined in different sovereigns. While it is true that State officers can be sued and controlled by suits in the Federal Court for violation of constitutional rights upon the theory that such officers as individuals have acted unlawfully under color of State statute, however, this does not mean that a State can be controlled by the courts in the performance of its political duties through suits against its officials. In this connection the statement of this Court in the case of GREAT NORTHERN LIFE INSURANCE CO. v. READ, 322 U. S. 47, 88 L. ed. 1121, 64 S. Ct. 873, is in point; this Court said:

> "This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. Chandler v. Dix, 194 U. S. 590, 48 L. ed. 590, 24 S. Ct. 766; Fitts v. McGhee, 172 U. S. 516, 529, 43 L. ed. 535, 541, 19 S. Ct. 269; Murray v. Wilson Distilling Co. 213 U. S. 151, 167, 53 L. ed. 742, 750, 29 S. Ct. 458; Lankford v. Platte Iron Works Co. 235 U. S. 461, 468, et seq., 59 L. ed. 316, 318, 35 S. Ct. 173; Re New York, 256 U. S. 490, 500, 65 L. ed. 1057, 1062, 41 S. Ct. 588; Worchester County Trust Co. v. Riley, 302 U. S. 292, 296, 299, 82 L. ed. 268, 273, 275, 58 S. Ct. 185. Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. Monaco v. Mississippi, 292 U. S. 313, 320, 78 L. ed. 1282, 1284, 54 S. Ct. 745; Louisiana v. Jumel, 107 U. S. 711, 720, 27 L. ed. 448, 451, 2 S. Ct. 128. A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent. Hans v.

Louisiana, 134 U. S. 1, 10, 16, 33 L. ed 842, 845, 847, 10 S. Ct. 504."

In the case of YATES v. UNITED STATES, 354 U. S. 298, 1 L. ed 2d 1356, 77 S. Ct. 1064, it was said that the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case whereas the prior proceedings were civil in character. It should be noted, however, that the prior proceeding, although civil in character, was of a penal nature, and it was said that the standards of proof in the civil proceeding were no greater than those applicable in the criminal proceeding. This is also explained in the Opinion of the District Judge in UNITED STATES v. BOWER, 95 F. Supp. 19, 21.

Complex questions also arise as to what facts can be used for estoppel purposes. Judge Learned Hand thought that there was some question as to the use of what he called "mediate data" which was decided in the first suit for the purpose of establishing ultimate facts in the second suit.

The attitude of the lower Federal Courts will be found in the following cases:

UNITED STATES v. KAADT, 171 F. 2d 600;

UNITED STATES v. COWART, 118 F. Supp. 903;

UNITED STATES v. PERRONE, 161 F. Supp. 252;

THE EVERGREENS v. NUNAN, 141 F. 2d 927;

WILLIAMS v. UNITED STATES, 179 F. 2d 644, 649.

Even if the Appellants had properly introduced the findings of fact and judgment of the civil action in the Federal Court into evidence in the criminal action in the State Court as they were required to do (FRIEDMAN v. MARYLAND CASUALTY CO., 228 Mo. Appeal Rep. 680, 71 S. W. 2d 491; PEOPLE v. RODGERS, 171 N. Y. S. 451) any estoppel or collateral estoppel would not be applicable, and the Supreme Court of North Carolina did not have to extend the doctrine to the Appellants under this situation.

Certainly if an acquittal in the Federal Court in a criminal action cannot prevent a State from prosecuting a defendant in a State Court for the same crime (BARTKUS v. ILLINOIS, ——— U. S. ———, 3 L. ed 2d 684; 79 S. Ct. ———), then by the sheer force of logic it is hard to see how a determination in a civil action in the Federal Court can prevent a criminal prosecution in the State Court even though it may involve some of the facts adjudicated in the Federal Court.

IV

THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION HAS NO APPLICATION IN THIS CASE.

The Supreme Court of North Carolina recognizes that the decisions of this Court are final in the interpretation of the Constitution of the United States; that its decisions are the law of the land and are authoritative in the State (CONSTANTIAN v. ANSON COUNTY, 244 N. C. 221, 229, 93 S. E. 2d 163). The Supreme Court of North Carolina further recognized in its Opinion in this case that citizens of the State could not be excluded from the golf course because of race or color and cited Federal cases to support this principle. The Supremacy Clause, therefore, has been recognized and followed where it is applicable. This does not mean that the Supreme Court of North Carolina must recognize the findings of fact and the judgment of the Federal District Court, and we do not believe that the application of the Supremacy Clause requires the State to extend the recognition demanded by the Appellants in this case.

V

THERE IS NO EVIDENCE THAT THE APPELLANTS HAVE BEEN DEPRIVED OF ANY RIGHTS OR PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT.

The Appellants seem to be under the impression at all

times during this case that because they were colored citizens they were entitled to play on the golf course whether they were members of the Golf Club or not and irrespective of any conditions or rules as to eligibility or membership applying to all persons regardless of race or color. The evidence shows that the Appellants came to the golf course and said that they wanted to play golf (R-44). They were told that it was a private Club for members and invited guests, and five of them put seventy-five cents (75c) each on the counter and went out on the grounds and began to play golf after being told that they could not play.

The Appellants utterly disregarded all membership requirements applicable to all citizens, and which, as far as we know, are applicable in all golf clubs everywhere.

The evidence of membership and the requirements applicable to all persons in order to have the privileges of the golf course are as follows:

(R-46) "We had membership for the golf club, Inc., and the dues for membership was $50.00 a year plus $10.00 Federal tax, which totaled $60.00. It was my duty to collect those fees. We had some other type of membership besides the annual fee of $60.00. Associate membership for a person who desired to play would have to pay additional greens fees as he played. All of the students would be eligible to play on the golf course plus their guest. ****

" **** We had a locker room which was provided for the members, and the members would pay a yearly fee for the lockers. We did not maintain lockers for any other persons other than the members. ****"

(R-48) "I am not familiar with the legal end of the Bylaws of the Gillespie Park Golf Club, Inc., but I believe I do know who is entitled to play on this Golf Course under the Bylaws of the Club. Members of Gillespie Park Golf Club, (fol. 45) members of the Carolina Golf Association, members of a club that belongs to the Carolina Golf Association

and the students and guests of me as an instructor. The way I interpret the bylaws, members who are allowed to play other than the members of the corporation are members of the Carolina Golf Association, as a separate class. That is my interpretation of the bylaws. ****"

(R-54—Appellant George Simkins, Jr.) "**** I have never filed for membership in the Gillespie Park Golf Club, Inc. I was not invited by any members of the club to play on this occasion. I was not invited by either of the two golf professionals there. ****"

(R-72) "By-Laws of the Gillespie Park Golf Club, Inc.

"ARTICLE I.

"Section 1—Membership.

"Membership in this corporation shall be restricted to members who are approved by the Board of Directors for membership in this Club. There shall be two types of membership; one, the payment of a stipulated fee of $30.00 or more, plus tax, shall cover membership and greens fees. The other type of membership shall be $1.00, plus tax, but this type of member shall pay greens fees each time he uses the course. The greens fees and the amount of membership fees may be changed by the Board of Directors at any time upon two-thirds vote of the members of the Board.

"Section 2—Use of Golf Facilities.

"The golf course and its facilities shall be used only by (fol. 71) members, their invited guests, members in good standing of other golf clubs, members of the Carolina Golf Association, pupils of the Professional and his invited guests. ****"

(R-77) "Q. Was the Nocho Park Golf Club, Inc. a member of the Carolina Golf Association on that date?

"Mr. Marsh: Objection.

"Court: Overruled.

"A. No, sir, it was not.

"There was no reciprocal agreement between the Gillespie Park Golf Club and Nocho Park Golf Club with reference to playing on the course. Our reciprocation was with other clubs that were members of the Carolina Golf Association.

"Q. Did any of these defendants on the 7th day of De- (fol. 76) cember, 1955, or any date prior thereto file with the Gillespie Park Golf Association an application for membership?

"Mr. Marsh: Objection.

"Court: Overruled.

"A. No, sir, they did not to my knowledge. ****"

The Trial Court specifically instructed the jury that Appellants could not be excluded from the golf course because of race. He instructed the jury as follows:

"Now, as to that question which arises upon the evidence, I instruct you then, ladies and gentlemen of the jury, that under the law as determined by the United States Court and as pronounced by them, the Gillespie Golf Club, Inc., by leasing the land from the City of Greensboro to use as a golf course was subjected to the same obligations as the City of Greensboro would have been had it operated a golf course itself. It was subjected to the same rights as the City would have had, the same obligations and same responsibilities; that is to say, the law would not permit the City and, therefore, would not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the maintenance and operation and use of a golf course. It could not exclude either defendant because of his race or for any other reason applicable to them alone; that is to say, they were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provid-

ed they complied with the reasonable rules and regulations for the operation and maintenance and use of the golf course. They would not be required to comply with any unreasonable rules and regulations for the operation and maintenance and use of the golf course. ****

"If the corporation organized and known as the Gillespie Park Golf Club, Inc., if it maintained property and operated and used it for a golf course belonging to the City of Greensboro and if the defendant was a resident of the City of Greensboro, then he had the same right to become a member of the golf club as any other resident of Greensboro, if he was a member of another golf club which had a reciprocal agreement with the Gillespie Park Golf Club to permit members on one course or members of one club playing on the other course, then such defendant and each of them had the same right or had the right to play upon that Gillespie Park Course. If the defendants, or either of them, were guests of some members of the Gillespie Park Golf Club, then they had a right to play upon that course.

"In other words, ladies and gentlemen of the jury, they had the same right under the laws as interpreted by the United States Courts to play on the golf course as any other citizen of the City of Greensboro provided they complied with the reasonable rules and regulations designed for the orderly maintenance and use of the golf course by the citizens of Greensboro. ****

"Furthermore, I instruct you that your verdict will not be prompted in any manner whatsoever by the race of the (fol. 91) defendants. That has absolutely nothing to do with the case in law and should not be considered by you. Under the law, all citizens have equal rights and equal responsibilities in the maintenance and use of public facilities, that is facilities maintained by the governmental unit in which they live, and therefore the fact that the defendants are Negroes certainly may not be considered to their prejudice nor to the prejudice of the State. In other words, ladies and gentlemen, you will consider the evidence as you recall and understand it to be with the law as I have attempted to in-

strued you the law to be, and arrive at a verdict which is fair, which is just and which speaks the truth. ****"

The trial judge recognized that color had nothing to do with the right of Appellants to play on the golf course and so told the jury, and the Supreme Court of North Carolina recognized that fact and further stated that it (the Supreme Court of North Carolina) did not question the soundness of the legal principles set forth in DAWSON v. MAYOR AND CITY COUNCIL OF BALTIMORE CITY, 220 F. 2d 386; LAWRENCE v. HANCOCK, 76 F. Supp. 1004; TATE v. DEPARTMENT OF CONSERVATION AND DEVELOPMENT, 133 F. Supp. 53; CULVER v. CITY OF WARREN, 83 N. E. 2d 82; HOLMES v. CITY OF ATLANTA, 350 U. S. 879, 76 S. Ct. 141, 100 L. ed. 876; BALTIMORE CITY v. DAWSON, 350 U. S. 877, 100 L. ed. 774, 76 S. Ct. 133, 220 F. 2d 386; DERRINGTON v. PLUMMER, CCA 5, 240 F. 2d 922; NEW ORLEANS CITY PARK IMPROVEMENT ASSO. v. DETREGE, 252 F. 2d 122, CCA 5; WARD v. CITY OF MIAMI, CCA 5, 252 F. 2d 787.

We do not understand that the Appellants have superior privileges because of their color but we do understand that they cannot be discriminated against because of their color. Appellants are subject to the same eligibility conditions as any other race. This point was expressly decided in FRASIER v. BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA, 134 F. Supp. 589, where a 3-Judge District Court decided that eligible Negroes could not be prohibited from attending the University of North Carolina because of their color. The Court was careful to say, however, that the Board of Trustees of the University had the power to decide as to whether or not applicants for admission were eligible, the Court saying:

> "But we decide only that the Negroes as a class may not be excluded because of their race or color; AND THE BOARD RETAINS THE POWER TO DECIDE WHETHER APPLICANTS POSSESS THE NECESSARY QUALIFICATIONS. This applies to the plaintiffs in the pending case, as well as to all Negroes who subsequently apply for admission (Emphasis ours)."

There being no reciprocal agreement between the Gillespie Park Golf Club and Nocho Park Golf Club with reference to playing on the golf course (State Record, p. 75) the Appellants were simply not eligible to play on the golf course, and it was not a question of color.

The Appellants were treated in the same manner in which any white person would have been treated, or any group of white persons, who came to the golf course, threw down 75c on the Club House counter, walked out on the course and commenced playing golf. Their exclusion from the golf course and the refusal to recognize their right to play golf under these conditions is no violation of the Fourteenth Amendment.

VI

THE SUPREME COURT OF NORTH CAROLINA WAS NOT REQUIRED TO TAKE JUDICIAL NOTICE OF THE EVIDENCE, FACTS, FINDINGS OF FACT AND JUDGMENT ENTERED BY THE FEDERAL DISTRICT COURT IN THE CIVIL ACTION.

On R-71 appears all of the evidence that was ever given in the criminal action now before the Court on the part of Myrtle D. Cobb, Deputy Clerk of the Federal Court in Greensboro, which is as follows:

> "My name is Myrtle D. Cobb and I am Deputy Clerk in the Federal Court in Greensboro, and I have in my possession or it is my duty to keep in my possession public records concerning Federal cases and I do have in my possession the record in the case of SIMKINS, et al. v. THE GILLESPIE PARK GOLF COURSE. I have all of the original papers in that case."

Immediately following this evidence (R-71) the question arose as to whether Mr. Hughes, President of Gillespie Golf Club, Inc., could be called by the defendants as an adverse witness. The only thing that again appears is on R-79 where we have the following:

"Mrs. Kennedy: If your Honor please, we'd like, if possible, to have a ruling on whether or not these would be admissible.

"Court: I am going to sustain the objection as to those two Exhibits, that is No. 6 and No. 7.

"Exception No. 22)."

Now, the Supreme Court of North Carolina did not know what "these" meant, and the State Court never did know what was contained in Exhibits 6 and 7 because they were never sent up as a part of the Record or Case on Appeal, and in North Carolina when the defendant appeals the defendant makes out the case on appeal and presents it to the prosecuting officer for agreement or exceptions. On R-105 the Court will see that Appellants tendered their case on appeal and that the prosecuting officer accepted service of same, and on R-106 the Court will see that the parties, that is, the Appellants and the prosecuting officer, stipulated that what the Appellants had tendered as the case on appeal would "constitute the case on appeal to the Supreme Court in this cause."

It is interesting to note (R-119) that the Appellants filed a motion suggesting diminution of the record but the Court will see that this motion pertains to records of the Municipal-County Court and not to any of the records pertaining to the facts and judgment of the Federal District Court in the civil action. On R-128 the Court will see that the Appellants filed a motion in the Supreme Court of North Carolina pertaining to Judicial Notice in which they recite certain portions of the opinion in the civil action in the Federal District Court (SIMKINS v. CITY OF GREENSBORO, 149 F. Supp. 562) and it is interesting to note that in the last paragraph in quotations on R-130 the Court recites that the decree has not yet been entered.

The Appellants now say that the Supreme Court of North Carolina should take judicial notice of the evidence, facts, findings of fact and judgment in the Federal District Court and thereby create an estoppel which is decisive of the case.

To support this they cite BROWN v. BOARD OF EDUCATION, 344 U. S. 1, 3, 97 L. ed. 3, 4, 73 S. Ct. 1; WELLS v. UNITED STATES, 318 U. S. 257, 260, 87 L. ed. 746, 748, 63 S. Ct. 582; and UNITED STATES v. JOHN J. FELIN & CO., 334 U. S. 624, 640, 92 L. ed. 1614, 1626, 68 S. Ct. 1238. An examination of these cases will show that they all originated in the Federal Courts, and, of course, the power of the Supreme Court of the United States to take judicial notice of decisions and proceedings in cases in the Federal Courts is one thing while the power of the Supreme Court of the United States to take judicial notice of proceedings in other cases upon a case coming from a State Supreme Court is another thing. For example: This Court does not take judicial notice of the decisions of the courts of one State in a case coming to it from the courts of another State (EASTERN BLDG. & L. CO. v. WILLIAMSON, 189 U. S. 122, 47 L. ed. 735, 23 S. Ct. 527. As we pointed out above, Mr. Justice Brandeis in his concurring opinion in WHITNEY v. CALIFORNIA, supra, said that the power of this Court was limited to the review of Federal questions as to a right guaranteed by the Federal Constitution and to particular claims duly made below and denied, and, further, that this Court lacked the power on review of a State case which was exercised on review of lower Federal courts to correct vital errors although objection was not made.

An affidavit or a verified motion is not sufficient to support a charge of discrimination and the filing of such affidavit or motion does not dispense with proof (TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572, 23 S. Ct. 402, affg. 43 Fla. 446, 30 So. 685; MARTIN v. TEXAS, 200 U. S. 316, 50 L. ed. 497, 26 S. Ct. 338).

The burden is on the Appellants to show discrimination based on race or color as to persons playing on the golf course (AIKENS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692, 65 S. Ct. 1276; MURRAY v. LOUISIANA, 163 U. S. 101, 41 L. ed. 87; FAY v. NEW YORK, 332 U. S. 261, 91 L. ed. 2043).

The Supreme Court of North Carolina in its opinion in this case (STATE v. COOKE, et al., 248 N. C. 485, 103 S. E.

2d 846) cited many cases showing that one court is not bound to take notice of the judgment in another court judicially. See R-116 where, among the cases cited to support this point, is SCHULER v. ISRAEL, 120 U. S. 506, 30 L. ed. 707, and this Court said that one court did not have to take judicial notice of the judgment of another court and the North Carolina Court also cited UNITED STATES v. WILSON, 7 Pet. 150, 8 L. ed. 640, where Chief Justice Marshall commented on this point. See also EYSTER v. GAFF, 91 U. S. 521, 23 L. ed. 403. We submit that the Appellants are in error and they confuse the question of judicial notice of facts, evidence and the proceedings in another court with the question of proper judicial notice of public documents. The Supreme Court of North Carolina, of course, recognizes the law as established by the opinions of Federal courts and did so in this case. Likewise, the Trial Judge extended the same recognition to legal decisions of Federal courts in this class of cases but this is not to be confused with supplying facts, evidence and a judgment based thereon when an estoppel of some nature is contended for as a defense and must be pleaded and introduced in evidence.

In closing this point, we would emphasize that the decisions of the lower Federal courts are in our favor. In WHITE v. CENTRAL DISPENSARY AND EMERGENCY HOSPITAL, 99 F. 2d 355, the Circuit Court of Appeals for the District of Columbia on this point said:

> "The appellee seeks further to support its position in respect of judicial notice by referring to the records of the trial court in other judicial proceedings as showing that the appellee is a charitable institution organized under D. C. Code (1929), tit. 5, c. 5, Sec. 121 et seq., for the purpose of providing 'a suitable building in the City of Washington, District of Columbia for a Dispensary where all needy persons, without distinction, may be provided gratuitously with medical and surgical service and treatment and with medicines.' Insofar as the records in the judicial proceedings referred to are sought to be taken advantage of as judicial holdings that the appellee is a charity, they are unavailing, even if the proper subject of judicial notice, because they cannot conclude the appellant in the instant case since he

was not a party to those proceedings. But the trial court could not take judicial notice of them and we cannot. A trial court cannot properly take judicial notice of the records before it between different parties. Murphy v. Citizens' Bank of Junction City, 82 Ark. 131, 100 S. W. 894, 12 Ann. Cas. 535; see Note, 11 L. R. A., N. S. 616, 1907. And a court of appeals cannot take judicial notice of what may appear upon the records of the subordinate courts within the boundaries of its judicial jurisdiction; it can act only upon the facts appearing in the record before it. Fitzgerald v. Evans, 8 Cir., 49 F. 426, 1892; In re Manderson, 3 Cir., 51 F. 501, 1892; Divide Creek Irrigation Dist. v. Hollinsworth, 10 Cir., 72 F. 2d 859, 96 A. L. R. 937, 1934; Bush v. Tecumseh Nat. Bank, 64 Neb. 451, 90 N. W. 236, 1902."

In PARIDY v. CATERPILLAR TRACTOR CO., 48 F. 2d 166, the Circuit Court of Appeals for the Seventh Circuit on this point said:

"It is true that a court will take notice of its own records, but it cannot travel for this purpose out of the record relating to the particular case; it cannot take notice of the proceedings in another case, even between the same parties and in the same court, unless such proceedings are put in evidence. **** (citing many cases) ****

"In absence of evidence to that effect, the reviewing court cannot take judicial notice that a case before the court had connection with one formerly decided by it. ****"

In GASOLINE PRODUCTS CO. v. CHAMPLIN REFINING CO., 46 F. 2d 511, the District Court on this point said:

"The bearing of the opinion in the above case consists in its reasoning and in its formulation of principles of law, so far as they are applicable to the instant case. I cannot, as urged by counsel for defendant, take judicial notice of the facts in the master's report mentioned in that case, nor use that opinion in any way except as an authority."

In BECKER STEEL CO. OF AMERICA v. CUMMINGS, 16 F. Supp. 601 on this point the District Court said:

"It is said further that in one of the proceedings in the initial suit brought by the plaintiff there is a certified copy of a decree of a West Virginia court by which a receiver of the plaintiff in dissolution was appointed. Such a paper is not a part of this bill, however, and facts set forth in it are not matter of judicial notice. A court will take judicial notice of its own records, but the notice does not extend to facts of evidentiary character alleged in papers filed by litigants in prior proceedings. National Casket Co. v. Stolts (C. C. A. 2) 174 F. 413. It is unnecessary, therefore, to consider whether the alleged receivership should be given extraterritorial effect."

We further urge upon this Court that as to whether or not the Supreme Court of North Carolina would take judicial notice of the judgment and supporting evidence and findings of fact in a Federal civil action is a question for that Court according to its local State law and not only is no Federal constitutional question presented but the decision is in accordance with the great weight of authority.

VII

THE APPELLANTS' BRIEF CONTAINS BURDENSOME, IRRELEVANT AND IMMATERIAL MATTER WHICH SHOULD BE DISREGARDED AND STRICKEN BY THE COURT.

MOTION

The Appellee, State of North Carolina, moves to strike from the Appellants' brief and from the records of this Court certain burdensome, irrelevant and immaterial matter, as follows:

(a) all of the Appendixes annexed to Appellants' brief, beginning on p. 80 and extending through p. 96;

(b) Finding of Fact No. 20 and Conclusion of Law No. 3, as appear in Appellants' brief, pp. 6, 7;

(c) Findings of Fact appearing in Appellants' brief on pp. 22, 23, 24;

(d) Findings of Fact appearing in Appellants' brief on pp. 61, 62, 63.

Argument upon the Motion

The records and newspaper articles, in fact all the matter appearing in the Apellants' Appendixes, relate to the golf course in question but none of these records or articles were ever introduced into evidence by the Appellants and none of this material was ever before the Trial Court or the Supreme Court of North Carolina. For example: On p. 80 of Appellants' brief appear excerpts as to facts which appear in the brief of the City of Greensboro, which was filed in the case of CITY OF GREENSBORO v. SIMKINS, 246 F. 2d 425. This was never before the Trial Court or the Supreme Court of North Carolina. In Appellants' brief, pp. 83, 84, 85, 86, 87, 88 appear an editorial of the *Greensboro Daily News* and following this appear certain newspaper articles about the golf course and also about the civil action in the Federal District Court. These were never introduced in evidence and were never before any of the State courts; they are simply put into the brief without any guarantee of authenticity or validity. In Appellants' brief on p. 89 appears a Resolution of the City Council of Greensboro which was never put in evidence and was never before any of the State Courts. Last of all, in the Appellants' brief on pp. 90, 91, 92, 93, 94, 95, 96 appear extracts from the Manual of Rules and Regulations of the Works Project Administration and Appellants rely upon this document in their Argument. This document was never presented to the Trial Court and was never before the Supreme Court of North Carolina.

We are familiar with the so-called "Economic Briefs" filed before this Court but we feel that the matter referred to above, which is not in the State Record or in the Transcript of Record before this Court, transcends all rules of brief-making. We believe that this Court desires to judge the State of North Carolina and the Supreme Court of that State justly and fairly, and, therefore, it will not take into consideration these documents and papers which the Prosecutor and the Trial Court had no opportunity to see or cross-examine about and which were never a part of the Record. In

fairness and justice the Appellee, State of North Carolina, asks that this matter be disregarded and stricken.

CONCLUSION

The Appellee, State of North Carolina, believes that it has shown the Court that on this Record no Federal question exists or has properly been raised below in the State Court, and, therefore, this Court does not have jurisdiction.

The Appellee believes that it has shown this Court that there is no basis on this Record for this Court to issue a writ of certiorari.

The Appellee believes that it has shown this Court that there is no question of *former jeopardy* or fundamental unfairness because of multiple criminal proceedings.

The Appellee believes that it has shown this Court that no question of *estoppel, collateral estoppel* or of *judicial notice* can aid the Appellants in this case and that the principles contended for by Appellants in these respects are not constitutional requirements.

The Appellee asks this Court to dismiss this appeal and to refuse to grant a writ of certiorari.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

NO. 7

LEON WOLFE, GEORGE SIMKINS, JR.
JOSEPH STURDIVENT, SAMUEL MURRAY,
and ELIJAH H. HERRING, Appellants

vs.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

REPLY TO BRIEF OF APPELLEE

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 7

Leon Wolfe, George Simkins, Jr.,
Joseph Sturdivent, Samuel Murray, and Elijah H. Herring

Appellants

v

State of North Carolina

Appeal from the Supreme Court of the State of North Carolina

REPLY TO BRIEF OF APPELLEE

The above-named appellants respectfully file this Reply To Brief of Appellee, State of North Carolina.

Corrections in Statement of the Case

On Page 6, under the first part of No. 6 under this heading, Appellee says of the Opinion of the United States District Court for the Middle District of North Carolina in **Simkins et al. v City of Greensboro et al., 149 Fed Supp 562,** and the affirming Opinion of the United States Court of Appeals for the Fourth Circuit, **246 Fed 2d 425:**

"If this Court will refer to the two Opinions filed by both the District Court of Appeals (sic) and the Circuit Court of Appeals, it will see that there is no recital of evidence or findings of fact in these two Opinions."

The North Carolina Supreme Court, in its Opinion in this case (R 115), said of the United States District Court's Opinion in the **Simkins Case:**

"Our knowledge of **the facts** in that case is limited to what appears in the published opinion." (Emphasis added.)

Appellants have numbered for identification and quoted verbatim twelve (12) "facts" from the Federal District Court's Opinion in the **Simkins Case.** (See Pages 13-15 of Appellants' Brief On The Merits.)

Appellee cannot wish these "facts" away nor make them disappear by merely saying that they are not there.

In the last part of No. 6 on Page 6 under this heading, Appellee says:

"We will discuss the racial aspects of the case later on but here it is sufficient to say that the Appellee, State of North Carolina, has never denied the right of colored citizens to play on this golf course, provided they become eligible as members on the same basis as white citizens."

The North Carolina Supreme Court, in its Opinion in this case (R 115), said of the **Simkins Case:**

> "On the facts presented to him, Judge Hayes issued an order enjoining racial discrimination in the use of the golf course."

Judge Johnson J. Hayes was the United States District Judge who tried the **Simkins Case.** He was born and reared and educated in North Carolina. Until his retirement since the **Simkins Case,** Judge Hayes had been for more than thirty years the first and only Judge of the United States District Court for the Middle District of North Carolina. He had practiced law in Greensboro (where the golf course here involved is located) before his appointment to the Bench. He had held court in Greensboro over those three decades and he was thoroughly familiar with the local scene. He is one of North Carolina's most distinguished sons and a Judge honored for his ability and integrity.

Is it conceivable that Judge Hayes, as the State Supreme Court found in its Opinion in this case that he did, would have "issued an order enjoining racial discrimination in the use of

the golf course," if Appellee's agencies had been completely spotless, as Appellee would have this Court believe, in operating this golf course without any racial discrimination?

Is it conceivable that, if racial discrimination had been wholly absent, Judge Hayes would have said in his Opinion (149 Fed Supp at 565):

> "This golf club permits white people to play without being members, or otherwise, except it requires the prepayment of greens fees. The plaintiffs here paid their fees, were forced off the course by being arrested for trespass. **Everybody knows this was done because plaintiffs were Negroes and for no other reason. This court can not ignore."?** (Emphasis added.)

This was one of "the facts" in the Opinion of the Federal District Court in the **Simkins Case,** which the North Carolina Supreme Court said it had "knowledge of."

Undoubtedly, Judge Hayes, being thoroughly familiar with the local scene, entertained the same view as that expressed by Mr. Justice Frankfurter in **Watts v Indiana, 338 US at 52: "And there comes a point where this Court should not be ignorant as judges of what we know as men."**

In support of this commonly and generally known racial discrimination at this golf course, which Judge Hayes said "everybody knows," Appellants have attached to their Brief On The Merits photographic reproductions of items from the daily newspapers in Greensboro, showing that this matter of racial discrimination and exclusion at this golf course was truly known to everybody in Greensboro and the environs covered by the widely circulated Greensboro Daily News and Greensboro Record.

The Record in this case also shows without contradiction (R 93) that those Jurors in this case who had played on Gillespie Park Golf Course "stated very frankly and freely in open court that they had played on this course without any requirements except the payment of greens fees."

In asking this Court to strike from Appellants' Brief On

The Merits the documents of common and general knowledge (Pages 59-60 of Appellee's Brief), Appellee (Page 60) says: "We are familiar with the so-called 'Economic Briefs' filed before this Court but we feel that the matter referred to above, which is not in the State Record or in the Transcript of Record before this Court transcends all rules of brief-making."

By its reference to "the so-called 'Economic Briefs' filed before this Court," Appellee doubtless has in mind such cases as **Muller v Oregon, 208 US 412.** But Appellants suggest that this Court considered the material which the late Mr. Justice Brandeis attached to his brief in **Muller,** not because the material dealt with economic and social matters, but because the material proved facts of common and general knowledge. This Court said in **Muller (208 US at 421):** "We take judicial cognizance of all matters of general knowledge."

Where racial discrimination and exclusion are so fixed and rampant at a public municipal golf course that a Federal District Judge feels called upon in his opinion to say that "everybody knows" it, Appellants believe that this presents a matter of common and general knowledge in the community which may be confirmed by material from such sources of common and general knowledge as the daily newspapers of a city like Greensboro.

Nor do Appellants believe that Appellee can close this Court's eyes to the bald admission by Appellee's agency, City of Greensboro, in its Brief and Appendix before the Court of Appeals in the **Simkins Case** (See Page 80 of Appellants' Brief On The Merits.): **"Until 1949, the City operated the golf course exclusively for white citizens."**

Of course, Appellee cannot dispute the following fact from Judge Hayes' Opinion in the **Simkins Case,** because the State Supreme Court in its Opinion in this case (R 115) said that it had knowledge of this fact: "The Negroes have not only been denied the privilege of the golf course but there is no intention on the part of the defendants to permit them to do so unless they are compelled by order of court." (149 Fed Supp at 563)

For the same reason Appellee cannot dispute the following fact in Judge Hayes' Opinion in the **Simkins Case**: "Although the golf course has been available to the public for many years, whether by design or otherwise, Negroes have been denied the enjoyment of the privilege." (149 Fed Supp at 563)

In addition to all of the above, Clyde Bass, Assistant Golf Pro (who was an agent of the State—see Record Pages 95-96, Finding of Fact No. 30) testified (R 45): "To my knowledge no Negroes have ever played at Gillespie Park Golf Course before this date. Some Negroes have presented themselves before this date to play, but none have played to my knowledge."

It is also a fact that, in answering Appellants' exceptions to the trial court's actions in denying Appellants the opportunity to prove by the State's agents the reasons why those agents had excluded Negroes from the golf course, Appellee, on Page 13 of its brief before the State Supreme Court, said:

> "These exceptions relate to the exclusion of certain evidence by the trial court. **The question of whether or not Negroes had previously been refused to play on the golf course is utterly immaterial.**" (Emphasis added.)

In answer to such an obvious "prima facie case" under this Court's "rule of exclusion" (See Hernandez v Texas, 347 US 475, 98 L ed 866, 74 S Ct 667, and Eubanks v Louisiana, 356 US 584, 2 L ed 2d 991, 78 S Ct 970.), Appellee offered the statement of its agent, Assistant Golf Pro Clyde Bass, and nothing more, that he denied Appellants their right to play on the golf course because "it was a private club for members and invited guests only."

Appellants respectfully submit that this attempted rebuttal of the prima facie case is much weaker than that held insufficient in **Hernandez, supra,** where five jury commissioners testified that they had not discriminated in the selection of jurors, and also that held insufficient in **Eubanks, supra,** where the current judges involved testified that they had not discriminated in the selection of grand jurors.

Appellants believe that the case of racial discrimination against them by the State's agents thus stands proved; that the use of the statute, GS 14-134, to make good that racial discrimination, renders that statute, "as applied" in this case, unconstitutional under the Fourteenth Amendment; and that the jail sentences imposed under this unconstitutional application of GS 14-134 must therefore fall with the statute as here "applied."

In No. 9 under its Statement of the Case, Page 7 of its Brief, Appellee says: "If the Court will examine the Motion to Quash (R-32) it will see that the Appellants do not attack directly the constitutionality of Sec. 14-134 of the General Statutes but Appellants complain of the administration of the statute in view of the decision of the Federal Court and because of the Supremacy Clause of the United States Constitution."

Appellants believe that the words of the Motion to Quash speak for themselves: ". . . that GS 14-134 is hereby being unconstitutionally applied to these defendants, . . ." in violation of the Supremacy Clause and the Fourteenth Amendment.

In **Raley v Ohio, __US__, 3 L ed 1344, 1353**, this Court said: "'It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, **as applied**, is repugnant to the Federal Constitution, treaties or laws.'" (Emphasis added.)

Appellants believe that their allegation that "GS 14-134 is hereby being unconstitutionally applied" to them meets this test, even to the extent of using the identical word "applied."

REPLY TO APPELLEE'S ARGUMENT I

Appellee's Argument I, which begins on Page 14 and ends on Page 35 of its Brief, reads as follows:

> "THE SUPREME COURT OF NORTH CAROLINA DECIDED THIS CASE ON AN INDEPENDENT, ADEQUATE AND TENABLE NONFEDERAL GROUND, AND THERE IS NO FEDERAL QUESTION FOR THE REVIEW OF THIS COURT."

The most noticeable thing about this argument, as it appears in Appellee's Brief, is that Appellee seeks support for it almost everywhere except in the Opinion of the Supreme Court of North Carolina **IN THIS CASE.**

This is not surprising to Appellants, however, for, in Appellants' view, this argument does not find support in the State Supreme Court's Opinion **in this case.**

Starting with the 7th line of the State Supreme Court's Opinion in this case (R 108), we find the following statement as to how the State Supreme Court was deciding this case:

"Before considering the merits of the cases, we must ascertain if defendants were properly called upon to answer the criminal charges leveled against them. The motions to quash assign three reasons why defendants should not be called upon to answer the allegation that they violated the criminal laws of the State of North Carolina.

"S. v. Cooke, 246 NC 518, 98 SE 2d 885, is relied upon for two of the three reasons assigned. An examination of that case is necessary **to assay the merits** of the motions." (Emphasis added.) (Of course, Appellants contend that the Motion to Quash (R 32) speaks for itself as to how many reasons were assigned and what the reasons were.)

Since both the Motion to Quash (R 32) and the Motion To Set Aside the Verdict (R 91) alleged substantial Federal Questions, how could the State Supreme Court consider **"the merits of the cases"** and assay **"the merits"** of the Motion to Quash, if it was about to decide "this case on an independent, adequate and tenable nonfederal ground," as Appellee says in this argument?

After assaying **"the merits"** of the Motion to Quash, the State Supreme Court closed its considerable discussion with this paragraph (R 110):

"Since none of the reasons nor all combined sufficed to sustain the motion to quash, the court correctly overruled the

motion and put defendants on trial for the offense with which they were charged."

Appellants believe that this is as clear a statement as could be made that "none of the" Federal grounds "nor all combined," as alleged in the Motion to Quash, "sufficed to sustain" Appellants' allegations "that GS 14-134 is hereby being unconstitutionally applied to these defendants" (R 32) and that making Appellants stand trial under the warrants here involved was an attempt of the Appellee "to make a crime out of specific acts and conduct which both the United States District Court for the Middle District of North Carolina and the United States Court of Appeals for the Fourth Circuit have specifically held to be protected by the Fourteenth Amendment to the Constitution of the United States" (R 32).

Since the State Supreme Court assayed and passed upon "**the merits**" of the Motion to Quash, the following principle, as stated in **Raley v Ohio, supra, (3 L ed 2d at 1354)**, becomes applicable:

> **"There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."**

Of course, "**'Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.'**" (See **Staub v City of Baxley** and other cases cited by Appellants on Pages 26-28, and **Angel v Bullington on Page 34**, of their Brief On The Merits.)

Not only did the State Supreme Court sustain the action of the trial court in overruling the Motion to Quash on "**the merits,**" but it specifically passed upon the question of Double Jeopardy set up in the Motion to Quash. The State Su-

preme Court said (R 109): **"It is manifest there is here no double jeopardy."**

Now, the words "Double Jeopardy," when considered under the Fourteenth Amendment of the Constitution of the United States in connection with criminal prosecutions in state courts, have become synonymous, in Appellants' view, with the words "fundamental unfairness." **(See Hoag v New Jersey, 356 US 464, 467, 2 L ed 2d 913, 917, 78 S Ct 829.)**

Appellants therefore contend that, when the State Supreme Court said in this case (R 109) that, "It is manifest there is here no double jeopardy," this was tantamount, under the decisions of this Court construing the meaning of 'Double Jeopardy" under the Fourteenth Amendment, to saying, in relation to the allegations of Appellants' Motion to Quash and Motion To Set Aside the Verdict, that "It is manifest there is here no fundamental unfairness in the trial of this case."

In this view, Appellants believe that this decision by the State Supreme Court that "It is manifest there is here no double jeopardy," was sufficient to bring before this Court all of the questions of "fundamental unfairness" which Appellants discuss on Pages 59-71 of their Brief On The Merits.

Appellants feel especially that this should be so, since the Motion to Quash alleged (R 34) that "such prosecution would violate the rights of the defendants and laws of the United States, including the Fourteenth Amendment," and also since the Motion To Set Aside the Verdict alleged (R 93) that "to permit this verdict to stand under these circumstances would violate the rights of the defendants under the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment."

As to the North Carolina Supreme Court's change of its rule that GS 14-134 applied only to lands "privately held" (See Page 65 of Appellants' Brief On The Merits), it is also true that Appellants raised this question at the first opportunity, namely, after the State Supreme Court had held for **the first time in this case** that GS 14-134 applies to public lands.

Since no petition for rehearing is permitted in a criminal case in the Supreme Court of North Carolina (R 139), this contention that this change of the rules violated fundamental fairness could not be called to the attention of the State Supreme Court.

Appellants do not claim any "vested right in prior decisions" of the North Carolina Supreme Court, as Appellee suggests on Page 27 of its Brief. We are here discussing Appellee's contention that this Court is without jurisdiction to consider this question of fundamental unfairness, and when that question must be raised in the state courts. (See discussion of **NAACP v Alabama** on this point, on Page 66 of Appellants' Brief On The Merits.)

Relying upon the prior rule that GS 14-134 applied only to lands "privately held," Appellants did call this prior rule of the Supreme Court of North Carolina to the attention of the trial court in the Motion To Set Aside the Verdict (R 95), but Appellants' contention as to what the rule of the Supreme Court of North Carolina was at that time was overruled by the trial court. Appellants could not anticipate that the State Supreme Court would change its rule, and therefore Appellants could not raise this particular question of fundamental unfairness until after the State Supreme Court had rendered its decision in this case.

As to Appellants' contention that the "lack of standards in the license-issuing practice" for playing on the golf course constituted "a denial of equal protection," this question was clearly before both the trial court and the State Supreme Court in the Opinion of Judge Hayes in the **Simkins Case,** where Appellee's agency, Gillespie Park Golf Club, Inc., contended that its rules and regulations constituted "administrative remedies" which Appellants had not exhausted. (149 Fed Supp at 565) In denying this contention, Judge Hayes said: "Moreover, there existed no known or uniform procedure of an administrative nature to be exhausted by plaintiffs." (149 Fed Supp at 565)

Besides, as shown above, Appellants alleged specifically

that both the prosecution and the verdict denied to Appellants the equal protection of the laws under the 14th Amendment. Of course, the State Supreme Court said that it had knowledge of what was in Judge Hayes' Opinion.

As to the "fundamental unfairness" of the State's adverse witness rule, it is not disputed that Pages 78 and 79 of the Record show that this rule suppressed vital material known to the State through its agent, the president of the golf corporation.

It is not disputed that in its Motion To Set Aside the Verdict Appellants alleged that to permit the verdict (obviously based upon this suppression) to stand "would violate the rights of these defendants under the Constitution and laws of the United States, including the due process and equal protection clauses of the 14th Amendment." (R 93)

It is not disputed that Appellants' objection to the effect of this adverse witness rule was overruled by the trial court (R 78) or that this action of the trial court was sustained by the State Supreme Court (R 118) in response to the following contention of Appellee on Page 13 of its Brief before the State Supreme Court:

> **"Of course, there was no error in the Court refusing to allow the witness Hughes to be called as an adverse witness. . . . This was a matter in this discretion of the Court, and counsel for defendants have evidently confused Federal practice with State practice."**

It cannot be disputed that the witness Hughes was in fact adverse. The Record shows this clearly. (R 78-79)

When this witness was on the stand as president of the golf corporation, in effect it was the State which was testifying and what was known to this witness was constitutionally known to the State. **(See Cooper v Aaron, 358 US 1.)**

Appellants believe that these facts bring this constitutional question properly before this Court.

REPLY TO APPELLEE'S ARGUMENT II

Appellee's Argument II, which begins on Page 35 of its Brief, reads as follows:

> "APPELLANTS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY ANY ALLEGED MULTIPLE TRIALS NOR DOES ANY QUESTION OF FORMER JEOPARDY ARISE BECAUSE APPELLANTS WERE TWICE TRIED OR BECAUSE BILLS OF INDICTMENT WERE PROCURED IN THE SUPERIOR COURT OF GENERAL JURISDICTION."

Appellants' Motion to Quash (R 35) and Motion To Set Aside the Verdict, by reference (R 92), alleged double jeopardy in violation of the Federal Constitution.

The State Supreme Court in its Opinion (R 109) specifically held: "It is manifest there is here no double jeopardy."

Since the State Supreme Court decided this Federal question of double jeopardy, as raised by Appellants in their Motion to Quash and Motion To Set Aside the Verdict, "there can be no question as to the proper presentation of" this Federal question. **Raley v Ohio, supra.**

Double jeopardy under the Fourteenth Amendment means "fundamental unfairness" under the decisions of this Court **(Hoag v New Jersey, supra)**, and thus when the question of double jeopardy is raised under the 14th Amendment, the question of "fundamental unfairness" is thereby necessarily raised, notwithstanding Appellee's suggestion to the contrary on Page 39 of its Brief. In **Hoag v New Jersey, supra**, it was made explicitly clear that under the decisions of this Court it is not multiple trials as such by state courts which may offend the 14th Amendment, but "The question in any given case is whether such a course has led to fundamental unfairness." In determining whether a state has practiced "fundamental unfairness" in conducting multiple criminal proceedings against defendants for the same acts and conduct, all of the facts and circumstances must be considered together, even though one fact or circumstance, standing alone, might not show "fundamental unfairness."

REPLY TO APPELLEE'S ARGUMENT III

Appellee's Argument III, which begins on Page 42 of its Brief, reads as follows:

"THE FEDERAL CONSTITUTION DOES NOT COMPEL THE STATE TO EXTEND TO THE APPELLANTS THE DOCTRINE OF ESTOPPEL OR COLLATERAL ESTOPPEL AND IRRESPECTIVE OF ANY CONSTITUTIONAL REQUIREMENTS THESE FORMS OF ESTOPPEL ARE NOT APPLICABLE IN THIS CASE."

Appellee clearly confuses the question of estoppel or collateral estoppel with the question of whether or not the Declaratory Judgment of the Federal Court for the Middle District of North Carolina in the **Simkins Case,** under the Supremacy Clause became a part of "the supreme Law of the Land, by which "the Judges in every State shall be bound . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This Court, in **Garner v Teamsters etc., 346 US 485, 500, 98 L ed 228, 245, 74 S Ct 161,** defined the issue and made the distinction, which Appellee fails to make, as follows:

> **"We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land, and cannot be curtailed, circumvented or extended by a State procedure merely because it will apply some doctrine of private right."**

It is because of this supremacy which attaches to the judgments of Federal Courts, as cases "when federal power constitutionally is exerted," that 28 USC 2283 authorizes Federal Courts to issue injunctions against state court proceedings, including criminal prosecutions, when necessary "to protect or effectuate" the judgments of such Federal Courts.

It is then a question, not of estoppel or collateral estoppel, but a question of supremacy under Article VI of the Constitution of the United States. **(See Thomason v Cooper, 254 Fed 2d 808, 810.)** The Federal Declaratory Judgment in the

Simkins Case became "the supreme law of the land, and cannot be curtailed, circumvented" by the criminal proceedings in this case.

REPLY TO APPELLEE'S ARGUMENT IV

Appellee's Argument IV, on Page 48 of its Brief, reads as follows:

> "THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION HAS NO APPLICATION IN THIS CASE."

In addition to what has been said above in the Reply to Appellee's Argument III, another word should here added. Neither under Argument IV nor elsewhere in its Brief does Appellee recognize the fact that this golf course was originally built with 65 per cent of its cost coming from Federal funds made available under Federal law.

In the Federal District Court's Opinion in the **Simkins Case**, appears this statement of fact (149 Fed Supp at 563): "Through Works Progress Administration, which furnished 65 per cent of the cost, the City of Greensboro built the last nine holes and agreed not to sell or lease for private use this public property during its life of usefulness." The Court's Findings of Fact were even more explicit. (See Page 6 of Appellants' Brief On The Merits.)

The fact that this was a Federal WPA project necessarily brought before the state courts, and brings before this Court, the Federal statute and its supporting regulations, under which this WPA grant was made to finance from Federal funds 65 per cent of the original cost of this golf course.

Appellants discuss the question at length, starting on Page 38 of their Brief On The Merits.

In **Grand River Dam Authority v Grand-Hydro, 355 US 359, 369-370, 93 L ed 64, 72,** this Court said:

> "As the question is thus presented whether the Federal Power Act has so far affected the use or value of this land for power site purposes as to deprive it of all fair

market value for those purposes and thus deprive the evidence of such value of all probative weight in this case, the fact that the state court purported to rest its decision largely on state law does not eliminate our duty to consider the question to the extent that it arises under federal law . . . It is, of course, for us to examine whether questions of federal law were necessarily, although only impliedly, adjudicated by the state court."

So, the fact that neither the State Supreme Court, nor Appellee mentions the Federal law under which 65 per cent of the original funds for this golf course was secured by the State's agencies, does not remove the Federal Emergency Relief Appropriation Act of 1939, 53 Stat 927, and its supporting regulations from this case. This raises vitally important questions under the Supremacy Clause.

REPLY TO APPELLEE'S ARGUMENT V

Appellee's Argument V, which begins on Page 48 of its Brief, reads as follows:

"THERE IS NO EVIDENCE THAT THE APPELLANTS HAVE BEEN DEPRIVED OF ANY RIGHTS OR PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT."

Whether or not the uncontroverted happenings in this case show that Appellee's agents were guilty of racial discrimination against Appellants, within this Court's "rule of exclusion" **(See Hernandez v Texas and Eubanks v Louisiana, supra.)** is, of course, for this Court to decide.

In **Niemotko v Maryland, 340 US 268, 271, 95 L ed 267, 270, 71 S Ct 325,** this Court said:

"In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded."

There is, however, one special point under Argument V which should be mentioned. It involves the following pro-

vision of the By-Laws of the golf corporation, quoted by Appellee on Page 50 of its Brief: "The golf course and its facilities shall be used only by members, their invited guests, members in good standing **of other golf clubs,** members of the Carolina Golf Association, pupils of the Professional and his invited guests.***" (Emphasis added.)

When it appeared that the provision, "members in good standing of other golf clubs" would include the Nocho Park Golf Club to which Appellants belonged, Appellee's agents found no difficulty in adding an **UNWRITTEN** part to this provision, so that it would exclude those golf clubs which were not members of the Carolina Golf Association. (R 51)

This proves what Judge Hayes said in his Opinion, when the golf corporation contended that Appellants had not exhausted their "administrative remedies," for in denying this contention Judge Hayes found (149 Fed Supp at 565): "Moreover, there existed no known or uniform procedure of an administrative nature to be exhausted by plaintiffs."

REPLY TO APPELLEE'S ARGUMENT VI

Appellee's Argument VI, which begins on Page 54 of its Brief, reads as follows:

> "THE SUPREME COURT OF NORTH CAROLINA WAS NOT REQUIRED TO TAKE JUDICIAL NOTICE OF THE EVIDENCE, FACTS, FINDINGS OF FACT AND JUDGMENT ENTERED BY THE FEDERAL DISTRICT COURT IN THE CIVIL ACTION."

Whether required to do so or not, the Supreme Court of North Carolina did take judicial notice of the Federal District Court's Opinion, saying (R 115): **"Our knowledge of the facts in that case is limited to what appears in the published opinion."** Appellee does not explain why the Findings of Fact, Conclusions of Law, and Decree and Injunction of the Federal District Court are entitled to less respect than the Federal District Court's Opinion.

But, be that as it may, since Federal rights are involved,

it is for this Court to determine what documents and facts in this case are entitled to judicial notice. **Lilly v Grand Trunk Western Railroad Company, 317 US 481, 488, 87 L ed 411, 416, 63 S Ct 347,** was a case coming from a state court and this Court determined that a rule of the Interstate Commerce Commission must be taken judicial notice of by the state courts.

Under its Argument VI Appellee also gives its answer to the "Question of Offering the Federal Records in Evidence," which Appellants discuss on Pages 48-50 of their Brief On The Merits. Nothing more needs to be said here, except to suggest that Appellee cannot be serious when it says that "the Supreme Court of North Carolina did not know what 'these' meant," in referring to Defendants' Exhibits 6 and 7, in view of the fact that the North Carolina Supreme Court, in the exercise of its wide discretion, did in fact go outside the record before it to find that "these" Exhibits 6 and 7 were "identified" (R 115).

REPLY TO APPELLEE'S ARGUMENT VII

Appellee's Argument VII, which begins on Page 59 of its Brief, reads as follows:

> "THE APPELLANTS' BRIEF CONTAINS BURDENSOME, IRRELEVANT AND IMMATERIAL MATTER WHICH SHOULD BE DISREGARDED AND STRICKEN BY THE COURT."

Appellants believe that every document attached to their Brief On The Merits (Pages 80 to 98) and the other documents mentioned under its Argument VII by Appellee, are documents which may be judicially noticed by this Court, for the reasons set forth by Appellants under "The Question of Judicial Notice," on Pages 72 to 77 of their Brief On The Merits.

Further discussion of what Appellee says under Argument VII may be found under Appellants' "Corrections of Statement of the Case" above.

Conclusion

Wherefore, Appellants renew the prayer contained in their Brief On The Merits.

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SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1959.

Leon Wolfe, George Simkins, Jr., et al., Appellants, *v.* State of North Carolina.	On Appeal From the Supreme Court of North Carolina.

[June 27, 1960.]

Mr. Justice Stewart delivered the opinion of the Court.

The appellants were convicted of violating a North Carolina criminal trespass statute,[1] and their convictions were upheld by the Supreme Court of North Carolina, 248 N. C. 485, 103 S. E. 2d 846. This appeal, grounded on 28 U. S. C. § 1257 (2),[2] attacks the constitutional validity of the statute as applied in this case. Because of doubt as to whether any substantial federal question was presented to or decided by the state courts, we postponed further consideration of the question of jurisdiction until the hearing of the case on the merits. 358 U. S. 925, 359 U. S. 951. For reasons to be stated, we have concluded that the appeal must be dismissed.[3]

[1] "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days: . . . ." N. C. Gen. Stat. § 14–134. This statute was first enacted in 1866. North Carolina Laws, Special Session, Jan., 1866, c. 60.

[2] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

[3] The appellants ask that the appeal be treated as a petition for certiorari in the event it is found that the appeal was improperly

There is no dispute as to the basic circumstances which led to the prosecution and ultimate conviction of the appellants. In December, 1955, Gillespie Park Golf Club, Inc., operated an 18-hole golf course on land which it leased from the City of Greensboro, North Carolina, and the Board of Trustees of the Greensboro City Administrative Unit. The bylaws of the lessee limited the use of the golf course to its "members" and persons in certain other specifically restricted categories.[4] On December 7, 1955, the appellants, who are Negroes, entered the club's golf shop and requested permission to play on the course. Their request was refused. Nevertheless, after placing some money on a table in the golf shop, the appellants proceeded to the course and teed off. After they had played several holes the manager of the golf course ordered them to leave. They refused. The manager then summoned a deputy sheriff, and, after the appellants were again ordered to leave the course and they had again refused, they were arrested upon warrants sworn to by the manager.

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taken. See 28 U. S. C. § 2103. The considerations which require dismissal of the appeal in this case also require denial of a petition for certiorari. See 28 U. S. C. § 1257 (3).

[4] The relevant provisions of the bylaws were as follows: "Section 1—Membership. Membership in this corporation shall be restricted to members who are approved by the Board of Directors for membership in this Club. There shall be two types of membership; one, the payment of a stipulated fee of $30.00 or more, plus tax, shall cover membership and greens fees. The other type of membership shall be $1.00, plus tax, but this type of member shall pay greens fees each time he uses the course. The greens fees and the amount of membership fees may be changed by the Board of Directors at any time upon two-thirds vote of the members of the Board.

"Section 2—Use of Golf Facilities. The golf course and its facilities shall be used only by members, their invited guests, members in good standing of other golf clubs, members of the Carolina Golf Association, pupils of the Professional and his invited guests."

The appellants were tried and convicted of violating the state criminal trespass statute. Pending their appeal to the Supreme Court of North Carolina they and others commenced an action against the City of Greensboro, the Greensboro Board of Education, and the Gillespie Park Golf Club, Inc., in the Federal District Court for the Middle District of North Carolina, asking for a declaratory judgment and an injunction forbidding the defendants from operating the golf course on a racially discriminatory basis. The federal court granted the injunction. *Simkins* v. *City of Greensboro*, 149 F. Supp. 562. Its judgment was affirmed by the Court of Appeals for the Fourth Circuit on June 28, 1957. *City of Greensboro* v. *Simkins*, 246 F. 2d 425. On the same date the Supreme Court of North Carolina, acting on the appeal from the criminal convictions in the state court, held that there had been a fatal variance in amendments to the warrants under which the appellants had been tried, and arrested the judgments against them. *State* v. *Cooke*, 246 N. C. 518, 98 S. E. 2d 885.

The appellants were again tried *de novo* in the Superior Court of Guilford County, North Carolina, for violating the state criminal trespass statute. At the outset they made a motion to quash, which was denied. The State presented evidence as to what had happened on the golf course on December 7, 1955. At the conclusion of the evidence the trial judge instructed the jury explicitly and at length that the defendants could not be convicted if they had been excluded from the golf course because of their race. Specifically, the trial judge charged the jury that ". . . the law would not permit the City and, therefore, would not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the maintenance and operation and use of a golf course. It could not exclude either defendant because of his race or for any other reason applicable to them

alone; that is to say, they were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provided they complied with the reasonable rules and regulations for the operation and maintenance and use of the golf course. They would not be required to comply with any unreasonable rules and regulations for the operation and maintenance and use of the golf course."[5] The jury returned a verdict of guilty. A motion to set aside the verdict was denied.

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[5] The trial judge's instructions in their entirety on this aspect of the case were as follows:

"Now, if the State has satisfied you from the evidence and beyond a reasonable doubt that the land in question, that is the golf course property, was the land of the corporation, that it had the actual possession of the property and that the defendants entered upon the land intentionally and that they did so after being forbidden to do so by an agent or employee of the corporation who was authorized to tell them that they could not play golf, then, nothing else appearing that would constitute a violation of the statute. However, although the State may prove beyond a reasonable doubt in a prosecution under this statute that the accused intentionally entered upon the land in the actual possession of the corporation after being forbidden to do so by an agent of the corporation and thereby establish as an ultimate fact that the accused entered the property without legal right, the accused may still escape conviction by showing as an affirmative defense that he entered under a bona fide claim of right.

"Bona fide claim of right means a claim of right in good faith or bona fide itself means in good faith. That is to say, when the defendants seek to excuse an entry without legal right as one taking place under a bona fide claim of right, then the burden is upon such defendant to show two things: not beyond a reasonable doubt or even by the greater weight of the evidence, but merely to the satisfaction of the jury, first, that he believed he had a right to enter; and second, that he had reasonable grounds for such belief.

"Now, the defendants by their plea of not guilty deny their guilt of each and every element of the offense charged, but they further say and contend that even if it be found that the land in question was in the actual possession of the corporation and that they entered the land intentionally and that they did so and remained there after being forbidden to do so, they say that even if that be found the

The Supreme Court of North Carolina affirmed the convictions. In doing so the court recognized that "[s]ince the operator of the golf club was charged with making a public or semipublic use of the property, it could not deny the use of the property to citizens simply because they were Negroes. . . . Since the decision in *Brown* v. *Board of Education*, 347 U. S. 483 . . . separation of the races in the use of public property cannot be required."

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they did so under a bona fide claim of right and that they believed they had a right to enter and that they had reasonable grounds for such belief.

"Now, as to that question which arises upon the evidence, I instruct you then, ladies and gentlemen of the jury, that under the law as determined by the United States Court and as pronounced by them, the Gillespie Golf Club, Inc., by leasing the land from the City of Greensboro to use as a golf course was subjected to the same obligations as the City of Greensboro would have been had it operated a golf course itself. It was subjected to the same rights as the City would have had, the same obligations and same responsibilities; that is to say, the law would not permit the City and, therefore, would not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the maintenance and operation and use of a golf course. It could not exclude either defendant because of his race or for any other reason applicable to them alone; that is to say, they were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provided they complied with the reasonable rules and regulations for the operation and maintenance and use of the golf course. They would not be required to comply with any unreasonable rules and regulations for the operation and maintenance and use of the golf course.

"Furthermore, I instruct you that your verdict will not be prompted in any manner whatsoever by the race of the defendants. That has absolutely nothing to do with the case in law and should not be considered by you. Under the law, all citizens have equal rights and equal responsibilities in the maintenance and use of public facilities, that is facilities maintained by the governmental unit in which they live, and therefore the fact that the defendants are Negroes certainly may not be considered to their prejudice nor to the prejudice of the State."

248 N. C., at 491, 103 S. E. 2d 850–851. The court quoted with approval the trial judge's instructions to the jury on this aspect of the case. It is from this judgment of the Supreme Court of North Carolina that the present appeal was taken.

The appellants contend that the Supremacy Clause and the Fourteenth Amendment required the North Carolina court to hold that the findings of fact and judgment of the federal court in the civil case of *Simkins* v. *City of Greensboro*, 149 F. Supp. 562, conclusively established contrary to the verdict of the jury in this case, that the state statute was used here to enforce a practice of racial discrimination by a state agency. The Supreme Court of North Carolina took cognizance of the federal court's published opinion in the *Simkins* case and commented with respect to it:

> "Examining the opinion, it appears that ten people, six of whom are defendants in this action, sought injunctive relief on the assertion that Negroes were discriminated against and were not permitted to play on what is probably the property involved in this case. We do not know what evidence plaintiffs produced in that action. It is, however, apparent from the opinion that much evidence was presented to Judge Hayes [in the Federal District Court] which was not before the Superior Court when defendants were tried. It would appear from the opinion that the entry involved in this case was one incident on which plaintiffs there relied to support their assertion of unlawful discrimination, but it is manifest from the opinion that that was not all of the evidence which Judge Hayes had. We are left in the dark as to other incidents happening prior or subsequent to the conduct here complained of, which might tend to support the assertion of unlawful

discrimination. On the facts presented to him, Judge Hayes issued an order enjoining racial discrimination in the use of the golf course. Presumably that order has and is being complied with. No assertion is here made to the contrary." 248 N. C., at 493, 103 S. E. 2d, at 852.

The North Carolina court did not decide, however, whether it was bound under the Constitution to give to the federal court's unpublished findings and judgment in the prior civil action the conclusive effect urged by the appellants in the present criminal case, because it held that as a matter of state law the findings and judgment were not before it.*

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*Although not reaching the merits of the claim that the Constitution would compel it to hold that the federal judgment operated as a collateral estoppel in the present case, the North Carolina court discussed the question of collateral estoppel at some length in its opinion by way of *obiter dicta:*

"The mere assertion that a court of this State has not given due recognition to a judgment rendered by one of our Federal courts merits serious consideration. . . .

"When the doctrine of collateral estoppel should be applied is not always easily solved. In *Van Schuyver* v. *State*, 8 P. 2d 688, it was held that a judgment in a civil action between prosecuting witness and defendant which determined the ownership of domestic fowl could not be used by the defendant in a criminal action to estop the State from prosecuting him on a charge of larceny. Similar conclusions have been reached in other jurisdictions with respect to the ownership of property. *State* v. *Hogard*, 12 Minn. 293; *People* v. *Leland*, 25 N. Y. S. 943; *Hill* v. *State*, 3 S. W. 764 (Tex.)

"It is said in the annotation to *Mitchell* v. *State*, 103 Am. St. Rep. 17: 'When the previous judgment arose in a case in which the state or commonwealth was the prosecutor or plaintiff and the defendant in the case at bar was also the defendant, and the judgment was with reference to a subject which is material to the case at bar, the doctrine of *res judicata* applies. (citations) But where the judgment to which it is sought to apply the doctrine of *res judicata* was rendered in a

It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 455; *Staub* v. *City of Baxley*, 355 U. S. 313, 318–320; *Ward* v. *Love County*, 253 U. S. 17, 22. Invoking this principle, the appellants urge that the independent state grounds relied upon for decision by the Supreme Court of North Carolina were untenable and inadequate, and that the question whether the Federal Constitution compelled that the findings and judgment in the federal case operated as a collateral estoppel in this case was properly before the state court for decision. It thus becomes this Court's duty to ascertain whether the procedural grounds relied upon by the state court independently and adequately support its judgment.

The Supreme Court of North Carolina stated in its opinion of affirmance that the "defendants, for reasons best known to themselves elected not to offer in evidence

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civil proceeding to which the state was not a party, or in a criminal proceeding to which the defendant in the case at bar was not a party, the doctrine of *res judicata* does not apply. (citations)"

"The Supreme Court of the United States has recognized and applied the law as there announced to differing factual situations. Compare *U. S.* v. *Baltimore & O. R. Co.*, 229 U. S. 244, 57 L. Ed. 1169, and *Williams* v. *N. C.*, 325 U. S. 226, 89 L. ed. 1577. Other illustrations may be found in: *S.* v. *Dula*, 204 N. C. 535, 168 S. E. 836; *Warren* v. *Ins. Co.*, 215 N. C. 402, 2 S. E. 2d 17; *Powers* v. *Davenport*, 101 N. C. 286; *S.* v. *Boland*, 41 N. W. 2d 727; *People* v. *McKenna*, 255 P. 2d 452; *S.* v. *Morrow*, 75 P. 2d 737; *S.* v. *Cornwell*, 91 A. 2d 456; *S.* v. *Greenberg*, 109 A. 2d 669. Extensive annotations appear as a note to *Green* v. *State*, 87 A. L. R. 1251; 30A Am. Jur. 518. 248 N. C., at 493, 495, 103 S. E. 2d, at 852, 853–854.

Compare what was said by this Court in *Hoag* v. *New Jersey*, 356 U. S. 464, 471: "Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held

the record in the Federal court case." 248 N. C., at 493, 103 S. E. 2d, at 852. This statement is borne out by the record before that court,[7] the so-called "case on appeal" prepared by the appellants themselves.[8] The appellants now advise us that in fact the federal court's findings and judgment were offered in evidence at the trial and

[7] In North Carolina, "[t]he 'transcript or record on appeal' [to the Supreme Court] consists of [1] the 'record proper' (i. e. summons, pleading and judgment) and [2] the 'case on appeal,' which last is the exceptions taken, and such of the evidence, charge, prayers, and other matters occurring at the trial as are necessary to present the matters excepted to for review." *Cressler* v. *Asheville*, 138 N. C. 482, 485, 51 S. E. 53, 54. The "record proper" includes "only those essential proceedings which are made of the record by the law itself, and as such are self-preserving," *State* v. *Gaston*, 236 N. C. 499, 501, 73 S. E. 2d 311, 313. The term "record" in this opinion refers, unless otherwise indicated, to that part of record on appeal which is contained in the "case on appeal" . . . *i. e.*, the transcript of the proceedings at the trial itself, containing the testimony of witnesses, proffers of evidence, exceptions and rulings thereon, etc., as selected and agreed upon by the parties.

[8] All that the record before the North Carolina court contained on this aspect of the case, here reproduced in its entirety, was "My name is Myrtle D. Cobb and I am Deputy Clerk in the Federal Court in Greensboro, and I have in my possession or it is my duty to keep in my possession public records concerning Federal cases and I do have in my possession the record in the case of Simkins, et al. v. The Gillespie Park Golf Course. I have all of the original papers in that case."

Eight pages later, following the transcript of the testimony of another witness, there appears in the record before the North Carolina court the following, also reproduced here in its entirety: "Mrs. Kennedy: If your Honor please, we'd like, if possible, to have a ruling on whether or not these would be admissible. Court: I am going to sustain the objection as to those two Exhibits, that is #6 and #7." There is nothing in the record before the North Carolina Supreme Court to indicate what "these" meant, and "Exhibits 6 and 7" were not further identified nor made part of the record as an offer of evidence as required by North Carolina law, *In re Smith's Will*, 163 N. C. 464, 79 S. E. 977, nor otherwise submitted to the Supreme Court of North Carolina.

excluded by the trial judge. They ascribe to "some quirk of inadvertence" their failure to include in their "case on appeal" the part of the transcript which would so indicate.* And they assert that, since the Supreme Court of North Carolina has "wide discretion" to go outside the record in order to get at the true facts, the Court's refusal

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* The appellants have included in an appendix to their brief an excerpt from the stenographic trial transcript. The trial transcript was made available to this Court after the argument, and the excerpt in question reads as follows:

"DIRECT EXAMINATION BY MRS. KENNEDY:

"Q. Will you state your name and address, please?

"A. I am Myrtle D. Cobb. I am deputy clerk in the Federal Court in Greensboro.

"Q. As Deputy Clerk in the Federal Court here in Greensboro, is it part of your duty to keep public records?

"A. Yes, it is.

"Q. Do you have a record in the case of Simkins, et al, vs. Gillespie Park Golf Course, et al?

"A. This is the case. It is all the original papers that went up to the Court of Appeals that was filed in our office.

"Q. Were the findings of fact part of that record?

"A. Yes.

"MRS. KENNEDY: Your Honor, at this time we'd like to offer into evidence a decree, the findings of fact, conclusions of law and opinion, as rendered by the Judge of the Federal Court, Middle District of Greensboro.

"MR. KORNEGAY: OBJECTION.

"THE COURT: Do you have anything further that you want to introduce in regard to that?

"MRS. KENNEDY: In addition to that, we have the opinion of the Circuit Court of Appeals on this case.

"MR. KORNEGAY: OBJECTION.

"THE COURT: Let the record show that is being offered in evidence. I will rule on it later.

"(The documents referred to were marked for identification DEFENDANTS' EXHIBITS 6 and 7.)

"THE COURT: Anything else?

"MRS. KENNEDY: Not with this witness, your Honor."

to do so here amounted to a refusal to exercise its discretion "to entertain a constitutional claim while passing upon kindred issues raised in the same manner." *Williams* v. *Georgia*, 349 U. S. 375, 383.

The difficulty with this argument, beyond the fact that the appellants apparently did not ask the North Carolina court to go outside the record for this purpose, is that that court has consistently and repeatedly held in criminal cases that it will not make independent inquiry to determine the accuracy of the record before it.[10] Illustrative decisions are: *State* v. *Robinson*, 229 N. C. 647, 50 S. E. 2d 740; *State* v. *Wolfe*, 227 N. C. 461, 42 S. E. 2d 515; *State* v. *Gause*, 227 N. C. 26, 40 S. E. 2d 463; *State* v. *Stewinter*, 211 N. C. 278, 189 S. E. 868; *State* v. *Dee*, 214 N. C. 509, 199 S. E. 730; *State* v. *Weaver*, 228 N. C. 39, 44 S. E. 2d 360; *State* v. *Davis*, 231 N. C. 664, 58 S. E. 2d 355; *State* v. *Franklin*, 248 N. C. 695, 104 S. E. 2d 837.

Thus in the *Robinson* case the court reversed a criminal conviction for insufficiency of the evidence, although noting that:

> "[T]he court below, in its charge . . . [referred] to . . . incriminating facts and circumstances which do not appear in the testimony included in the record

[10] In *civil* cases, the North Carolina Supreme Court, on motion of a party, has issued "a *certiorari* to give the [trial] Judge an opportunity to correct the 'case' already settled by him, [but] . . . such *certiorari* never issues (except to incorporate exceptions to the charge filed within ten days after adjournment: *Cameron* v. *Power Co.*, 137 N. C., 99) unless it is first made clear to the Court, usually by letter from the Judge, that he will make the correction if given the opportunity." *Slocumb* v. *Construction Co.*, 142 N. C. 349, 351, 55 S. E. 196, 197; *Sherril* v. *Western Union Telegraph Co.*, 116 N. C. 655, 21 S. E. 429; *Broadwell* v. *Ray*, 111 N. C. 457, 16 S. E. 408; *Lowe* v. *Elliott*, 107 N. C. 718, 12 S. E. 383. Here, the case on appeal was not settled by the trial judge, and no motion for certiorari was made.

before us. This would seem to indicate that the record fails to include all the evidence offered by the State.

"Be that as it may, the record on appeal imports verity, and this Court is bound thereby. (Citing cases.) This is true even though the case is settled by counsel, (citing cases) and not by the judge (citing cases) . . . .

"The Supreme Court is bound by the case on appeal, certified by the clerk of the Superior Court, even though the trial judge has had no opportunity to review it, and must decide questions presented upon the record as it comes here, without indulging in assumptions as to what might have occurred." 229 N. C., at 649–650, 50 S. E. 2d, at 741–742.

In *State* v. *Wolfe* the court reversed a criminal conviction on the ground of error in the trial court's instructions to the jury, although pointing out that:

"The quoted excerpts from the charge do not reflect the clarity of thought and conciseness of statement usually found in the utterances of the eminent and experienced jurist who presided at the trial below . . . . Even so, it [the record] is certified as the case on appeal. We are bound thereby and must decide the question presented upon the record as it comes here, without indulging in assumptions as to what might have occurred." 227 N. C., at 463, 42 S. E. 2d, at 516–517.

In the *Gause* case the court also reversed a conviction upon the ground of error in the charge, although noting that:

"Doubtless the use of the words 'greater weight of evidence' instead of 'beyond reasonable doubt' was a slip of the tongue or an error in transcribing. Never-

theless, it appears in the record, and we must accept it as it comes to us." 227 N. C., at 30, 40 S. E. 2d, at 466.

In the *Stiwinter* case, involving a similar issue, the court said:

"We are constrained to believe that this instruction has been erroneously reported, but it is here in a record duly certified . . . which imports verity, and we are bound by it." 211 N. C., at 279, 189 S. E., at 869.

The *Dee* case involved similar issues. There the court noted:

"It is suggested by the Attorney-General that, in all probability, a typographical error has crept into the transcript and that the word 'disinterested' was used where the word 'interested' appears. In this he is supported by a letter from the judge who presided at the trial, and upon this letter a motion for *certiorari* to correct the record has been lodged on behalf of the State . . . . [T]he transcript is not now subject to change or correction. *State* v. *Moore*, 210 N. C., 686, 188 S. E., 421 It imports verity and we are bound by it . . . . 'Under C. S., 643, if the case on appeal as served by the appellant be approved by the respondent or appellee, it becomes the case and a part of the record on appeal, and in connection with the record [proper], may alone be considered in determining the rights of the parties interested in the appeal . . . . The appeal must be heard and determined on the agreed case appearing in the record.'" 214 N. C., at 512, 199 S. E., at 732.

It is thus apparent that the present case is not of a pattern with *Williams* v. *Georgia*, *supra*. Even if the North Carolina Supreme Court has power to make inde-

pendent inquiry as to evidence proffered in the trial court but not included in the case on appeal, its decisions make clear that it has without exception refused to do so.[11] This is not a case, therefore, where the state court failed to exercise discretionary power on behalf of appellants' "federal rights" which it had on other occasions exercised in favor of "kindred issues."

The appellants contend additionally that they brought the federal court's findings and judgment in the *Simkins* case before the state courts in two other ways: (a) by their motion to quash at the outset of the trial, and (b) by their motion to set aside the verdict at the trial's conclusion. The motion to quash set out the existence and

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[11] In *Aycock* v. *Richardson*, 247 N. C. 233, 100 S. E. 2d 379, and *Mason* v. *Commissioners of Moore*, 229 N. C. 626, 51 S. E. 2d 6, the court went beyond the record for the restricted and quite different purpose of determining whether it had jurisdiction of the appeal, *i. e.*, to determine whether an appeal had been properly taken in accordance with North Carolina General Statutes 1-279 and 1-280. In other cases the North Carolina Supreme Court has remanded a cause for completion of the record on appeal because the *record proper* (as opposed to the case on appeal) lacked certain primary essentials. *State* v. *Butts*, 91 N. C. 524 (record failed to show that a court had been held by a judge or that a grand jury had been drawn, sworn, and charged); *State* v. *Farrar*, 103 N. C. 411, 9 S. E. 449 (same); *State* v. *Daniel*, 121 N. C. 574, 28 S. E. 255 (record did not show the organization of the court below or when and where the trial had been held). See also *Kearnes* v. *Gray*, 173 N. C. 717, 92 S. E. 149. In the same category must be placed those cases in which the North Carolina Supreme Court, on motion of a party, remanded the cause for correction of the *record proper*. See *State* v. *Brown*, 203 N. C. 513, 166 S. E. 396 (error in the transcription of the verdict); *State* v. *Mosley*, 212 N. C. 766, 194 S. E. 486 (omission in the transcription of the verdict). See also *State* v. *Marsh*, 134 N. C. 184, 47 S. E. 6 (case reversed because of omission of part of the indictment in the record on appeal). As to the important distinction in North Carolina between the record proper and case on appeal, see n. 7, *supra*.

alleged effect of the federal court proceedings, and requested leave to offer in evidence in support of the motion "the full record and judgment roll in said case." The motion to set aside the verdict incorporated by reference the motion to quash and also contained an independent summary of the federal court proceedings, requesting the court to take judicial notice of the same. Both motions were denied by the trial court without opinion.

As to the motion to quash, the Supreme Court of North Carolina sustained the trial court's ruling on the ground that the " 'court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established by evidence *aliunde* the record, the motion must be denied.' " 248 N. C., at 489, 103 S. E. 2d, at 849. In upholding the denial of the second motion, the Supreme Court of North Carolina declined to take judicial notice of the federal court's findings and judgment, for reasons discussed at some length in its opinion, and concluded that the appellants "were not, as a matter of right, entitled to have the verdict set aside." 248 N. C., at 495, 103 S. E. 2d, at 854. An independent examination of North Carolina law convinces us that the state court in both instances was following well-established local procedural rules; it did not make an *ad hoc* determination operating discriminatorily against these particular litigants.

At least since the decision in *State* v. *Turner*, 170 N. C. 701, 86 S. E. 1019, in 1915, it has been the settled rule in North Carolina that "[a] motion to quash . . . lies only for a defect on the face of the warrant or indictment." 170 N. C., at 702, 86 S. E., at 1020. The rule that a motion to quash cannot rest on matters *dehors* the record proper has, so far as investigation reveals, been rigidly adhered to

in all subsequent North Carolina decisions.[12] See *State* v. *Brewer*, 180 N. C. 716, 717, 104 S. E. 655, 656; *State* v. *Cochran*, 230 N. C. 523, 524, 53 S. E. 2d 663, 665; *State* v. *Andrews*, 246 N. C. 561, 565, 99 S. E. 2d 745, 748. In the present case the state court simply followed this settled rule of local practice.

A similar conclusion must be reached as to the denial of the motion made at the end of the trial. That motion requested "[t]hat the verdict rendered by the jury . . . be set aside, that the Court withhold and arrest judgment and discharge the defendants notwithstanding the verdict, or grant the defendants a new trial. . . ." Whether the motion be technically considered as one to set aside the verdict and grant a new trial or as one to arrest the judgment and dismiss the defendants, the action of the North Carolina Supreme Court in upholding its denial was clearly in conformity with established state law. "A motion to set aside the verdict and grant a new trial is addressed to the discretion of the court and its refusal to grant such motion is not reviewable on appeal." *State* v. *McKinnon*, 223 N. C. 160, 166, 25 S. E. 2d 606, 610; *State* v. *Chapman*, 221 N. C. 157, 19 S. E. 2d 250; *State* v. *Johnson*, 220 N. C. 252, 17 S. E. 2d 7. See also *State* v. *Wagstaff*, 219 N. C. 15, 19, 12 S. E. 2d 657, 660; *State* v. *Brown*, 218 N. C. 415, 422, 11 S. E. 2d 321, 325; *State* v.

[12] There is a statutory departure from the settled rule. A North Carolina statute, enacted more than 70 years ago, providing that "[a]ll exceptions to grand jurors for and on account of their disqualifications shall be taken . . . by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived." N. C. Gen. Stat. 9-26. The North Carolina courts have held that when a motion to quash is employed to attack the qualification of grand jurors, the defendant may rely on evidence outside the record proper. See *State* v. *Gardner*, 104 N. C. 739, 10 S. E. 146; *State* v. *Peoples*, 131 N. C. 784, 42 S. E. 814; *State* v. *Speller*, 229 N. C. 67, 47 S. E. 2d 537; *Miller* v. *State*, 237 N. C. 29, 74 S. E. 2d 513; *State* v. *Perry*, 248 N. C. 334, 103 S. E. 2d 404.

Caper, 215 N. C. 670, 2 S. E. 2d 864. "A motion in arrest of judgment can be based only on matters which appear on the face of the record proper, or on matters which should, but do not, appear on the face of the record proper. . . . The record proper in any action includes only those essential proceedings which are made of record by the law itself, and as such are self-preserving. . . . The evidence in a case is no part of the record proper. . . . In consequence, defects which appear only by the aid of evidence cannot be the subject of a motion in arrest of judgment." *State* v. *Gaston*, 236 N. C. 499, 501, 73 S. E. 2d 311, 313; *State* v. *Foster*, 228 N. C. 72, 44 S. E. 2d 447; *State* v. *Brown*, 218 N. C. 415, 422, 11 S. E. 2d 321, 325; *State* v. *McKnight*, 196 N. C. 259, 145 S. E. 281; *State* v. *Shemwell*, 180 N. C. 718, 721, 104 S. E. 885.

Examination of the whole course of North Carolina decisions thus precludes the inference that the Supreme Court of North Carolina in this case arbitrarily denied the appellants an opportunity to present their federal claim. The judgment before us for review is the judgment which the Supreme Court of North Carolina made on the record before it, not the action of the State trial court. "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan* v. *Bransford*, 139 U. S. 197; *Brown* v. *Massachusetts*, 144 U. S. 573; *Jacobi* v. *Alabama*, 187 U. S. 133; *Hulbert* v. *Chicago*, 202 U. S. 275, 281; *Newman* v. *Gates*, 204 U. S. 89; *Chesapeake & Ohio Railway Co.* v. *McDonald*, 214 U. S. 191, 195." *John* v. *Paullin*, 231 U. S. 583, 585. "[W]hen as here there can be no pretence

that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong." *Nickel* v. *Cole*, 256 U. S. 222, 225.[13]

A word of emphasis is appropriate, before concluding, to make entirely explicit what it is that is involved in this case, and what is not. There is no issue here as to the constitutional right of Negroes to use a public golf course free of racial discrimination. From first to last the courts of North Carolina fully recognized that under the Constitution these appellants could not be convicted if they were excluded from the golf course because of their race. The trial judge so instructed the jury, and the Supreme Court of North Carolina so held. Cf. *Constantian* v. *Anson County*, 244 N. C. 221, 93 S. E. 2d 163. Upon the evidence in this case the jury's verdict established that no such racial discrimination had in fact occurred. "On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive deter-

[13] It has been suggested that even though the ground relied upon by the Supreme Court of North Carolina is an adequate state ground, this case should not be dismissed, but remanded because of a supervening "event." But there has been no significant "change either in fact or law, which has supervened since the judgment was entered" by the Supreme Court of North Carolina. *Patterson* v. *Alabama*, 294 U. S. 600, 607. All that has happened is that the State Attorney General's Office, at this Court's request after argument, made available a transcript of the trial court proceedings which was stated to be accurate. But it has not been suggested that the State at any time has questioned that the transcript of the trial court's proceedings would reflect that the documents had in fact been offered in evidence in the trial court. See note 9. This case thus does not involve a situation where there has been an intervening change in fact or law. Compare *Gulf, C. & S. F. R. Co.* v. *Dennis*, 224 U. S. 503; *Pagel* v. *MacLean*, 283 U. S. 266; *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511, 515–516.

mination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple." *Watts* v. *Indiana*, 338 U. S. 49, 50.

What is involved here is the assertion of a quite different constitutional claim—that the Supremacy Clause and the Fourteenth Amendment require a state criminal court to give conclusive effect to fact findings made in a civil action upon different evidence by a Federal District Court. While intimating no view as to the merits of this constitutional claim, we note only that it is a completely novel one. Cf. *Hoag* v. *New Jersey*, 356 U. S. 464, 470–471. The North Carolina Supreme Court did not decide this asserted federal question. We have found that it did not do so because of the requirements of rules of state procedural law within the Constitutional power of the States to define, and here clearly delineated and evenhandedly applied. We have no choice but to determine that this appeal must be dismissed because no federal question is before us. That determination is required by principles of judicial administration long settled in this Court, principles applicable alike to all litigants, irrespective of their race, color, politics, or religion.

Dismissed.

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1959.

Leon Wolfe, George Simkins, Jr., et al., Appellants, v. State of North Carolina. | On Appeal From the Supreme Court of North Carolina.

[June 27, 1960.]

Mr. Chief Justice Warren, with whom Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Brennan join, dissenting.

I do not agree that the decision below rests on adequate nonfederal grounds. And—whether it does or not—it seems to me that the case should not be dismissed in view of developments since the argument.

The crucial holding below is that the North Carolina courts could not consider the *Simkins*[1] record because appellants "for reasons best known to themselves elected not to offer [it] in evidence." 248 N. C., at 493, 103 S. E. 2d, at 852. It goes without saying that the procedural rule thus invoked—that appellants must rely on evidence which was offered at the trial—is, in itself, reasonable. In fact, that rule is elementary in most types of practice. The difficulty here lies not in the rule, but in its application to this case, on this record, and in the light of the fact, acknowledged by the State,[2] that appellants offered the *Simkins* record in evidence.

The relevant facts are few. When the federal court granted its injunction in *Simkins*, it found that appellants had been excluded from Gillespie Park on the occasion in

[1] *Simkins* v. *City of Greensboro*, 149 F. Supp. 562, affirmed, *City of Greensboro* v. *Simkins*, 246 F. 2d 425.

[2] The State has stipulated to the accuracy of a stenographic trial transcript made available to the Court, after argument, at the Court's request. See the Court's opinion, note 9. Of course, the State denies that the transcript has any relevance to the issues before the Court

question because they are Negroes. *Simkins* v. *City of Greensboro*, 149 F. Supp. 562, 565. As was held below such exclusion, if established as a fact in *this* case, would be a complete defense to the State's trespass charge. 248 N. C., at 491–493, 103 S. E. 2d, at 851–852. Therefore, appellants offered the *Simkins* record in evidence during their trial.[3] They claimed under the Supremacy Clause and the Fourteenth Amendment, that the federal court determination barred the state prosecution. However, the State objected to appellants' offer of proof, and the trial court sustained the objection.[4] Thereafter, the jury convicted.

On appeal to the Supreme Court of North Carolina, appellants sought review of their contention that the federal court findings were binding on the State in the subsequent criminal proceedings. At this point they made the mistake which deprived them of the opportunity to have that federal question reviewed. They failed to include their offer of proof and the rejected exhibits in their case on appeal, although they did include the ruling on the State's objection. With the resulting defective record before it, the State Supreme Court held that it could not review appellants' federal question because, as has been indicated, appellants "for reasons best known to themselves elected not to offer [the *Simkins* record] in evidence."

The Court holds that the state ground is adequate to support the decision below because, although we know the fact to be to the contrary, the assertion that appellants failed to offer the *Simkins* record in evidence "is borne out by the record" which the state court had before it. I cannot read that record—appellants' case on appeal—as does the Court. Therefore, I do not agree

[3] See the Court's opinion, notes 8, 9.

[4] See the Court's opinion, note 8.

that the state ground is adequate. But even if it were, it does not follow that the case must—or should—be dismissed. Rather, the State's stipulation—a supervening event which may be of critical significance under North Carolina law—requires a different disposition, in the interests of justice, under controlling precedent.

First. It cannot be said, even on the defective record which the State Supreme Court had before it, that appellants "for reasons best known to themselves elected not to offer [the *Simkins* record] in evidence." On the contrary, appellants' case on appeal indicates clearly that appellants offered the *Simkins* record in evidence. When the portions of that record set out in the Court's opinion [3] are read as a whole with the entire case on appeal, it seems reasonably clear that the *Simkins* record was offered in evidence, that the State objected to the offer, and that the objection was sustained. Therefore, whether the result below could have been based on other grounds or not, the factual premise for the ground on which it *was* based lacks fair and substantial support in the record. *That* ground, therefore, is not adequate. Cf. *Creswill* v. *Grand Lodge*, 225 U. S. 246; *Union Pacific R. Co.* v. *Public Service Comm'n*, 248 U. S. 67; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655; see *United Gas Co.* v. *Texas*, 303 U. S. 123, 143. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U. S. 22, 24. Since the *only* state ground mentioned in the opinion below is inadequate, this Court should either proceed directly to a consideration of the federal question or—if deemed desirable—should remand the case to the state court for further consideration.

[3] See the Court's opinion, note 8.

Second. Even if the state ground were adequate, the case should not be dismissed. After the argument in this Court, the State furnished the Court with a copy of the actual stenographic transcript of the trial. The State stipulated to the accuracy of that transcript. The transcript shows, beyond peradventure, that the decision below was based "upon a supposed state of facts which does not exist." *Gorham* v. *Pacific Mut. Life Ins. Co.*, 215 N. C. 195, 200, 1 S. E. 2d 569, 572. The North Carolina court apparently recognizes infirmity in its decisions in such cases. *State* v. *Marsh*, 134 N. C. 184, 47 S. E. 6. Therefore, the State's stipulation, an event "which has supervened since the judgment [below] was entered," may very well "affect the result." *Patterson* v. *Alabama*, 294 U. S. 600, 607. Accordingly, under firmly established principles, the case should either be remanded for a decision by the state court on the legal effect of the State's stipulation,[6] or we should decide this question of state law ourselves.[7] To take such action "is not to review, in any proper sense of the term, the decision of the state court upon a nonfederal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case." *Patterson* v. *Alabama*, *supra*, at 607; *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511, 515–516.

Third. It should not be assumed that *other* state grounds, not relied on below, would preclude reconsideration by the state court if the case were remanded. As has been indicated, the State's stipulation may create infir-

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[6] *Gulf, C. & S. F. R. Co.* v. *Dennis*, 224 U. S. 503; *Pagel* v. *MacLean*, 283 U. S. 266; *Patterson* v. *Alabama*, *supra*; *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511; *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 155–156; *Williams* v. *Georgia*, 349 U. S. 375.

[7] *Missouri ex rel. Wabash R. Co.* v. *Public Service Comm'n*, 273 U. S. 126; *Steamship Co.* v. *Joliffe*, 2 Wall. 450.

mity in the state court's decision, under North Carolina law. See *State* v. *Marsh, supra.* A remaining obstacle to appellate review of appellants' federal question, under North Carolina practice, may be the omission of the rejected exhibits from appellants' case on appeal. See *In re Smith's Will,* 163 N. C. 465, 79 S. E. 977. But records can be corrected. The Court refers us to cases which show that the North Carolina court may permit corrections in the record proper [8] and in the case on appeal.[9] It may authorize corrections not only when fault is attributable to the lower court,[10] but also when it is chargeable to the parties.[11] It may do so pursuant to agreement between the parties [12] and pursuant to motion of one of the parties.[13] Indeed, it appears that it may

[8] *State* v. *Mosley,* 212 N. C. 766, 194 S. E. 486; *State* v. *Brown,* 203 N. C. 513, 166 S. E. 396; *State* v. *Marsh, supra; State* v. *Daniel,* 121 N. C. 574, 28 S. E. 255; *State* v. *Farrar,* 103 N. C. 411, 9 S. E. 449, 104 N. C. 702, 10 S. E. 159; *State* v. *Butts,* 91 N. C. 524; cf. *Aycock* v. *Richardson,* 247 N. C. 233, 100 S. E. 2d 379; *Mason* v. *Moore County Board,* 229 N. C. 626, 51 S. E. 2d 6.

[9] *Cameron* v. *Power Co.,* 137 N. C. 99, 49 S. E. 76; *Arnold* v. *Dennis,* 131 N. C. 114, 42 S. E. 552; *Sherrill* v. *Western Union Tel. Co.,* 116 N. C. 654, 21 S. E. 400; *Broadwell* v. *Ray,* 111 N. C. 457, 16 S. E. 408; *Lowe* v. *Elliott,* 107 N. C. 718, 12 S. E. 383; cf. *Aycock* v. *Richardson,* 247 N. C. 233, 100 S. E. 2d 379; *Mason* v. *Moore County Board,* 229 N. C. 626, 51 S. E. 2d 6.

[10] *Cameron* v. *Power Co.,* 137 N. C. 99, 49 S. E. 76; *Sherrill* v. *Western Union Tel. Co.,* 116 N. C. 654, 21 S. E. 400; *Broadwell* v. *Ray,* 111 N. C. 457, 16 S. E. 408; *State* v. *Daniel,* 121 N. C. 574, 28 S. E. 255.

[11] *Arnold* v. *Dennis,* 131 N. C. 114, 42 S. E. 552; *State* v. *Daniel,* 121 N. C. 574, 28 S. E. 255.

[12] *Smith* v. *Capital Coca-Cola Bottling Co.,* 221 N. C. 202, 19 S. E. 2d 626; *Gorham* v. *Pacific Mut. Life Ins. Co., supra; Miller* v. *Scott,* 185 N. C. 93, 116 S. E. 86.

[13] *State* v. *Mosley,* 212 N. C. 766, 194 S. E. 486; *State* v. *Brown,* 203 N. C. 513, 166 S. E. 396; *Cameron* v. *Power Co.,* 137 N. C. 99, 49 S. E. 76; *State* v. *Marsh, supra; Sherrill* v. *Western Union Tel. Co.,* 116 N. C. 654, 21 S. E. 400; *Broadwell* v. *Ray,* 111 N. C. 457, 16 S. E. 408.

be able to do so on its own motion.[14] Its power to inquire into the accuracy of the record before it is established—to some extent at least—by recent decisions,[15] and its power to order the lower courts to send up "additional papers and parts of the record" is explicitly recognized by its rules.[16] Therefore, the state court *could* permit a correction of the record—and consequently could decide the federal question—if the case were remanded.

It is true that there is language in North Carolina cases, to which the State has called our attention, that indicates that a record settled by agreement—rather than by the trial court—may only be corrected by agreement. See *Smith* v. *Capital Coca-Cola Bottling Co.*, 221 N. C. 202, 19 S. E. 2d 626; *Gorham* v. *Pacific Mut. Life Ins. Co.*, *supra*. And language from *State* v. *Dee*, 214 N. C. 509, 512, 199 S. E. 730, 732, quoted by the Court in another connection, suggests that the state court is disinclined to permit the correction of a defective record when the case on appeal is settled by the parties. But these cases are not in point in the circumstances of the case before us.

The rule stated in *Smith* and *Gorham*—that a record settled by agreement can only be corrected by agreement—is subject to a very relevant qualification. For in *Gorham*, the North Carolina court observed, in denying

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[14] See *Aycock* v. *Richardson*, 247 N. C. 233, 100 S. E. 2d 379; *Mason* v. *Moore County Board*, 229 N. C. 626, 51 S. E. 2d 6; *State* v. *Butts*, 91 N. C. 524; *State* v. *Daniel*, 121 N. C. 574, 28 S. E. 255; *State* v. *Farrar*, 103 N. C. 411, 9 S. E. 449, 104 N. C. 702, 10 S. E. 159.

[15] *Aycock* v. *Richardson*, 247 N. C. 233, 100 S. E. 2d 379; *Mason* v. *Moore County Board*, 229 N. C. 626, 51 S. E. 2d 6.

[16] N. C. S. C. Rule 19 (1). Rule 19 (1) sets out the requirements as to form and content of transcripts on appeal. After setting out these requirements, it recites: "Provided, further, that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up."

a losing party's request for a certiorari to correct the record, that:

> "[T]here is no concession on the part of the [prevailing party] that the case has been decided 'upon a sham issue,' or 'upon a supposed state of facts which does not exist, nor yet upon a misconception of the record. *Cook* v. *Mfg. Co.*, [183 N. C. 48, 110 S. E. 608]; *S.* v. *Marsh*, [*supra*]. These are allegations of the [losing party], and [the prevailing party] says they rest only in allegation. She further says that the interpretation placed upon the record 'was and is absolutely correct'; . . . and that the transcript admits of no other interpretation." 215 N. C., at 200, 1 S. E. 2d, at 572.

Here, on the other hand, the State has stipulated to facts which *do* establish that the case was decided below "upon a supposed state of facts which does not exist." That is precisely what the prevailing party in *Gorham* did not concede. This case, therefore, is governed by *Cook* and *Marsh*, not by *Gorham*.

Likewise, in *Dee*, the North Carolina court denied the State's request for a certiorari to correct an alleged error in the case on appeal. But in *Dee*, as in *Gorham*, the prevailing party did not concede that there was any error in the record. In fact, the court itself expressed skepticism about the State's claim:

> "It is suggested by the Attorney-General that, in all probability, a typographical error has crept into the transcript and that the word 'disinterested' was used where the word 'interested' appears. In this he is supported by a letter from the judge who presided at the trial, and upon this letter a motion for *certiorari* to correct the record has been lodged on behalf of the State. The solicitor apparently took a dif-

ferent view of the matter when he agreed to the statement of case on appeal with an exception pointed directly to the expression." 214 N. C., at 512, 199 S. E., at 732.

On these facts, quite different from those before us, it is perhaps understandable that the state court refused to entertain the State's appeal to its discretion.

Therefore, it appears that if the case were remanded, appellants would very likely be permitted to correct their case on appeal, in view of the State's stipulation. And, as has been indicated, a correction could now be allowed even if the State objected to it. But I am sure that the State would not object, for North Carolina has no interest in depriving its citizens of their liberty on assumptions that do not accord with fact. It seems clear, therefore, that under North Carolina law, appellants may yet have their federal question reviewed—unless we dismiss.[12]

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[12] Under my view of the case, it is unnecessary to decide whether the North Carolina court's broad powers with respect to the record, and the evidence of their frequent exercise in the interests of justice, see notes 8–16, *supra*, are consistent with the Court's rejection of appellants' argument, based on *Williams* v. *Georgia*, 349 U. S. 375, that the North Carolina court should have gone outside the record to get at the truth as it has in some other cases. *E. g.*, *Aycock* v. *Richardson*, 247 N. C. 233, 100 S. E. 2d 379.

However, it may be worth noting in this connection that there is no relevant distinction between criminal cases like this one and civil cases like *Aycock*. Cf. the Court's opinion, note 10. The same statute, said to limit the power of the state court to go outside the record, see *State* v. *Dee*, *supra*, at 512, 199 S. E., at 732 (quoted by the Court), is equally applicable to either type of case. Likewise, the apparently inflexible rule stated in the criminal cases cited by the Court is also stated in numerous civil cases. See, as representative, *Hagan* v. *Jenkins*, 234 N. C. 425, 67 S. E. 2d 380; *Bame* v. *Palmer Stone Works*, 232 N. C. 267, 59 S. E. 2d 812. The same precedents are applicable in both types of case. See, for example, *Bame* v. *Palmer Stone Works*, *supra*, and conversely, the *Dee* and *Weaver* cases.

In view of the federal court finding that the appellants were excluded from Gillespie Park because of their race, these convictions give rise to serious constitutional doubts. Unless dismissal cannot be avoided, the appellants should not be deprived of their liberty without being heard on their federal question. Our own precedents require that we either remand the case or decide the questions which it presents.

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cited by the Court. Therefore, if the rule stated in the criminal decisions relied on by the Court is as inflexible as it purports to be, it should be equally so in civil cases. Yet *Aycock* shows that the rule is less rigid in fact than in articulation.

The Court also distinguishes *Aycock* because there the state court went outside the record to verify an apparent lack of jurisdiction. See the Court's opinion, note 11. However, so far as has been called to our attention, the North Carolina court has never suggested such a distinction. It would seem more logical, therefore, to assume that if the state court can go outside the record where it apparently lacks jurisdiction, it can do so where its jurisdiction is clear.